# In the Supreme Court of the United States

OCTOBER TERM, 1977

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SUPREME COURT, U.S.

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

*Petitioners,*

v.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,
*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, Lake Country Estates, Inc., Country Club Estates, and Bouldin Development Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 21, 1977. That judgment and opinion affirmed in part, reversed in part, vacated in part, and remanded a judgment and opinion entered by the United States District Court for the Eastern District of California dismissing petitioners' complaint.

### OPINIONS BELOW

The opinion of the Court of Appeals of which petitioners seek review is reported at 566 F.2d 1353; a copy is appended

hereto as Appendix A. The order of the Court of Appeals denying petitioners' petition for rehearing is unreported; a copy is appended as Appendix B. A previous opinion of the Court of Appeals withdrawn upon rehearing was reported at 558 F.2d 928; a copy is appended as Appendix C. The District Court's opinion is unreported; a copy is appended as Appendix D.

## JURISDICTION

The Court of Appeals' judgment was entered on December 21, 1977. A petition for rehearing was denied on January 30, 1978 (App. B). This petition is being filed within 90 days of both dates. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. This is an action against the Tahoe Regional Planning Agency ("TRPA"), an agency created by compact between California and Nevada approved by Congress. Under the compact, TRPA is a "separate legal entity" and "political subdivision" of the compacting states. Petitioners allege that TRPA has taken their property without just compensation and without due process of law. The Court of Appeals held that petitioners state a claim for relief under the Fifth Amendment. Nevertheless, the Court ruled *sua sponte* that TRPA is immune from suit under the Eleventh Amendment solely because it is an agency created by interstate compact. Neither the compacting states nor TRPA ever asserted that TRPA was immune under the Eleventh Amendment. There are presently over 175 interstate compacts creating more than 70 other administering boards, commissions and agencies; other compacts now under consideration would create a half dozen more.



Does the Eleventh Amendment provide immunity to all bi-state and multi-state agencies created by interstate compacts, as a class, without regard to the particular circumstances of their organization, powers, functions, financing, and other elements of their relationships with the participating states?

2. In making TRPA immune from suit, the Court of Appeals disregarded this Court's and other courts' decisions which have held that the Eleventh Amendment does not apply to counties and other political subdivisions of a state. By the express terms of the compact, TRPA is a "political subdivision" of the compacting states for the purpose of actions in the federal courts. Furthermore, most of TRPA's funds are paid and a majority of its members are appointed by local cities and counties, and the functions it performs, including the land use regulation at issue in this case, are traditionally local functions.

Does the Eleventh Amendment provide immunity to a political subdivision funded primarily by counties, governed by a body a majority of whose members are appointed by cities and counties, and performing traditionally local functions previously performed by those cities and counties merely because it is created by an interstate compact?

3. The Court of Appeals found that California and Nevada had not waived Eleventh Amendment immunity for TRPA by joining in the compact that created it. The compact provides that civil actions involving the agency are to be brought in the courts of the state where the affected property is situated "unless the action is brought in a federal court." For this purpose, it provides that TRPA is deemed a "political subdivision" of both states. Congress' consent to the compact provided that it should not "in any way affect the powers . . . of the

United States, or the applicability of any law or regulation of the United States . . . ."

Does an interstate compact that creates a bi-state agency, terms it a "political subdivision" of the states, refers to suits in the federal courts involving that agency, and provides that the compact in no way affects the powers of the United States waive any Eleventh Amendment immunity that otherwise might attach to the agency?

4. Petitioners allege that the members of the governing body of TRPA infringed petitioners' constitutional rights by taking their property without due process of law and without just compensation. Six of the ten members of the governing body are appointed by cities and counties within the Lake Tahoe Basin. The governors of California and Nevada each appoint one member. The other two members are state executive officials. The Court of Appeals held that these individuals are entitled to absolute immunity from liability to the extent they were acting in a "legislative" capacity.

Do appointed members of the governing body of a "political subdivision" have *absolute* immunity from any claim for damages for acts infringing constitutionally protected rights merely because those acts may be characterized as "legislative"?

## STATUTES INVOLVED

The statutes involved are these:

1. Article I, § 10, cl. 3 of the Constitution of the United States, providing: "No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."
2. The Eleventh Amendment to the Constitution of the United States, providing:



"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. The Tahoe Regional Planning Compact, California Government Code §§ 66800-66801 (West Supp. 1977); Nevada Revised Statutes §§ 277.190-277.230 (1973); Congressional consent granted, Act of December 18, 1969, Public Law No. 91-148, 83 Stat. 360. The text of the Compact, with additional consent provisions added by Congress, is contained in Pub. L. No. 91-148, set out verbatim in Appendix E.

## STATEMENT OF THE CASE

In 1968 California and Nevada entered into a compact to create an agency to regulate and control development in the Lake Tahoe Basin, a geographic region that lies partly in each state. Cal. Gov't Code §§ 66800 *et seq.* (West Supp. 1977); Nev. Rev. Stat. §§ 277.190 *et seq.* (1973). Congressional consent was required before the Tahoe Regional Planning Compact ("the Compact") was effective, under Article I, § 10, cl. 3 of the United States Constitution, providing that "[n]o state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." Congress consented in December, 1969. Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969).

The Compact created the Tahoe Regional Planning Agency ("TRPA") as a "separate legal entity". (Compact, Art. III(a)). TRPA is deemed, for purposes of suit, to be a "political subdivision" of both states. (Compact, Art. VI(b)). TRPA is responsible, under the Compact, for adopting and implementing a regional plan providing for land use, transportation, conservation, recreation, public

services and facilities and similar subjects for the Lake Tahoe Basin. TRPA has a governing board of ten members, of whom none are elected. Six are appointed by county and city governments in the area; two are appointed, respectively, by the governors of California and Nevada; and two are members by virtue of their offices in resources agencies of the states.[1] Under the Compact, TRPA's funding also comes principally from the cities and counties in the Lake Tahoe Basin.[2]

Petitioners Lake Country Estates and Country Club Estates own certain parcels of real property within what is now TRPA's jurisdiction. Petitioner Bouldin Development Corporation is the beneficiary of a deed of trust on the Lake Country Estates property. Prior to the acts of the TRPA complained of in this action, the property had a fair market value of approximately $25,000,000.

In 1971, Lake Country Estates and Country Club Estates submitted plans for the development of their property to El Dorado County and to TRPA's Advisory Planning Commission. The plans were approved.

On February 10, 1972, however, TRPA adopted a "regional plan," consisting in part of a "Land Use Ordinance" ("LUO") and a "General Plan." Under the LUO petitioners' land was classified as "General Forest" and "Conservation Reserve." The LUO prohibited any development or use of the property for any purpose except hiking

1. The governing body also has a nonvoting member appointed by the President of the United States. Act of December 18, 1969, Pub. L. No. 91-148, § 3, 83 Stat. 360.

2. The counties within the region may be assessed up to a total of $150,000 by TRPA and are authorized to levy taxes to finance it. TRPA may also collect fees for services and accept gifts, donations, subventions, grants, and other financial aids and funds. Compact, Art. VII(a), (b), and (d).



trails, camps, riding trails, forest management programs, fire lookouts, and the like.

Petitioners applied to TRPA once again seeking permission to develop their property. TRPA arbitrarily and without cause rejected the application and reclassified all of petitioners' property as Conservation Reserve, effectively prohibiting development and any beneficial use of the property and destroying any value of the property. TRPA also announced its intention to acquire petitioners' property.

On April 16, 1973, petitioners Lake Country Estates and Country Club Estates filed a complaint in the United States District Court for the Eastern District of California, against TRPA, El Dorado County, the States of California and Nevada, and the members of TRPA's governing body and TRPA's executive officer (hereinafter referred to as "the individual defendants").[3] Petitioners alleged that the defendants had taken petitioners' property without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Similar claims were alleged under the Compact and the constitutions and laws of the States of Nevada and California. Petitioners sought damages and injunctive and declaratory relief. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343,[4] as well as 28 U.S.C. § 2201 and the court's pendent jurisdiction.

3. The complaint was amended by stipulation to add Bouldin Development Corporation as a plaintiff on October 15, 1973.

4. The District Court had jurisdiction under 28 U.S.C. § 1331 because each plaintiff's claim exceeded $10,000, exclusive of interest and costs, and arose under federal constitutional provisions and the federal law of the Compact. It had jurisdiction under 28 U.S.C. § 1343 because plaintiffs asserted claims under 42 U.S.C. § 1983 for violations of constitutional rights under color of state law.

Defendants filed motions to dismiss this action and numerous other actions brought by other property owners asserting similar claims.[5] On December 11, 1975, the District Court dismissed all of the cases. Although it held that the complaints all "state facts sufficient for a cause of action in inverse condemnation," it ruled that "an inverse condemnation action could not be brought against" TRPA. It therefore granted TRPA's motion to dismiss without leave to amend. It dismissed claims against the individual defendants on the ground that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." It also dismissed all other defendants. Judgment was entered accordingly on December 16, 1975.

Petitioners appealed to the Ninth Circuit Court of Appeals, where the case was consolidated with others involving TRPA. In its first opinion issued on August 5, 1977, the Ninth Circuit reversed the District Court in part, holding that the complaint stated claims for damages and for injunctive and declaratory relief against TRPA under the due process clause of the Fifth Amendment.[6] (App. C, pp. 34-35) It affirmed dismissal of the states (but not TRPA) on the basis of the Eleventh Amendment and dismissal of the County on other grounds. (App. C, pp. 31-40) With respect to petitioners' damages claims against

5. A hearing on the motions was set for February 1, 1974, but was stayed by the District Court on its own motion pending a ruling by the Ninth Circuit Court of Appeals in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, which the District Court had dismissed for lack of subject matter jurisdiction. Following the Ninth Circuit's reversal in *League to Save Lake Tahoe*, 507 F.2d 517 (9th Cir. 1974), and this Court's denial of certiorari, *cert. denied sub nom. Raley v. League to Save Lake Tahoe*, 420 U.S. 974 (1975), the District Court reset the motions in this case and in all other TRPA cases assigned to it for hearing on September 25, 1975.

6. The Court of Appeals held that petitioners stated no claim under the just compensation clause of the Fifth Amendment because TRPA did not have power to condemn the property. (App. C, p. 31)



the individual defendants, the court held that the individual defendants were entitled to "absolute" immunity to the extent they were acting in a "legislative" capacity and a qualified immunity to the extent they were acting in an "executive" capacity. (App. C, pp. 45-49)

TRPA petitioned for rehearing. On December 21, 1977, the Ninth Circuit Court of Appeals withdrew its August 5, 1977, opinion and issued a second opinion in its place.

In its second opinion the court ruled, for the first time and *sua sponte*, that TRPA is immune from suit under the Eleventh Amendment. (App. A, pp. 6-9) TRPA had never claimed such immunity at any stage. California and Nevada had vigorously denied that TRPA was an arm of either state or anything but a local governmental entity. (See App. F) The Court of Appeals itself had not suggested in its earlier opinion that TRPA was immune from suit. Nevertheless, the Court of Appeals held that TRPA was immune from suit on the basis of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which it construed to hold that "bi-state compacts . . . preserve Eleventh Amendment immunity for entities created under them." (App. A, p. 8) It also stated that even if *Petty* were not a binding decision, it "would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958)." (App. A, p. 8) The Ninth Circuit also held, in contrast to *Petty*, that California and Nevada had not waived immunity by entering into the Compact. (App. A, pp. 11-12) Accordingly, it dismissed TRPA as a defendant.

Thus the Ninth Circuit held that in federal court property owners whose property has been taken by an agency such

as TRPA can recover damages or other compensation for the taking only against the officials of the agency. None of the other defendants, the states, the counties, or the agency itself, is accountable in damages for the taking in any federal court. Moreover, property owners can recover from those officials only to the extent they acted in an "executive" capacity in taking the property, and only if they can be shown to have acted in bad faith or to have departed from evenhanded enforcement of the regulations they enacted. Otherwise, even those officials have an "absolute" immunity, and no one is liable for the taking of the property.

Petitioners filed a petition for rehearing. The court denied the petition on January 30, 1978.

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals Decision Presents Important Questions Concerning the Application of the Eleventh Amendment to Agencies Created by Interstate Compact.

The interstate compact is a widely used tool for meeting the increasingly complex and diverse needs of the states. As of December, 1977,[7] there were over 175 such compacts in effect, spanning a wide and growing range of governmental activity. Not a single state is party to fewer than a dozen. Forty-seven compacts were formed in the decade between 1961 and 1970. Some 20 proposals for new compacts are currently under consideration.

More than 70 of the compacts now in effect have created administering boards, commissions, and agencies. Compacts now under consideration would create half a dozen more.

7. The following discussion is based on and statistics are taken from Council of State Governments, *Interstate Compacts, 1783-1977 (A Revised Compilation)* (1977), and Council of State Governments, *Interstate Compacts, 1783-1970 (A Compilation)* (1971). *See also* Frankfurter & Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L. J. 684, 735-748 (1925).



Their activities include conservation, corrections, health, labor conditions, nuclear energy, planning, pollution, publice safety, public welfare, and transportation. Some concern matters and geographical jurisdictions traditionally considered local, such as waterworks projects for Kansas City,[8] the development of the St. Louis metropolitan area,[9] and an interstate school district for Hanover, New Hampshire, and Norwich, Vermont.[10] Others exhibit regional concerns overlapping portions of two or more states, *e.g.*, bridges across the Delaware River between New Jersey and Pennsylvania,[11] and conservation of fishing resources in the tidewater portion of the Potomac River.[12] Still others affect whole regions of the country, *e.g.*, apportionment of the water of the Colorado River,[13] and water uses, economic development, and environmental quality in the Great Lakes area.[14] In short, agencies wielding power under the aegis of this "centaur of legislation,"[15] part state and part federal law, are a widely-used, powerful, and pervasive aspect of government in the United States.

The decision of the Court of Appeals below concerned the amenability of these institutions to suit in the federal

8. Act of September 22, 1922, ch. 431, 42 Stat. 1058 (1922).

9. Bi-State Development Agency Compact, Act of August 31, 1950, ch. 829, 64 Stat. 568.

10. New Hampshire-Vermont School District Compact, Act of November 13, 1963, Pub. L. No. 88-177, 77 Stat. 332.

11. Delaware River Joint Toll Bridge Compact, Act of August 30, 1935, ch. 833, 49 Stat. 1051, 1058.

12. Potomac River Compact of 1958, Act of October 10, 1962, Pub. L. No. 87-783, 76 Stat. 797.

13. Colorado River Compact, Act of December 21, 1928, ch. 42, 45 Stat. 1057.

14. Great Lakes Basin Compact, Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414.

15. Comment, Federal Question Jurisdiction to Interpret Interstate Compacts, 64 Geo. L.J. 87, 110 (1975).

courts under the Eleventh Amendment, and the amenability of their officers to such suits under doctrines of official immunity. Its decision in essence held that these agencies, transcending state boundaries and performing governmental functions of a varied nature, cannot be brought to account in the federal courts. That decision is wrong. It conflicts with the applicable decisions of this Court and with decisions of the Second and Eighth Circuits. See Sections I(B) and (C) below. It is also an important decision, presenting an issue that has a profound effect on the lives and activities of millions of persons and organizations and thousands of governments at all levels of the federal system. It is, however, an issue this Court has never addressed, having passed it over to decide on other grounds in the single case where it was presented. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). See Section I(A) below. Furthermore, the Ninth Circuit's ruling that the Eleventh Amendment has not been waived in this case conflicts with *Petty* on the one issue this Court did decide. See Section I(D) below.

### A. THIS COURT HAS NEVER DECIDED WHETHER THE ELEVENTH AMENDMENT APPLIES TO AGENCIES CREATED BY INTERSTATE COMPACT.

*Petty* was a negligence suit under the Jones Act, 46 U.S.C. § 688, against a bi-state corporation, created by compact, that operated a bridge across the Mississippi River. The question presented to this Court was whether the Eleventh Amendment prevented the action from being prosecuted against the corporation in the federal courts. The majority opinion held that it did not because, assuming the Eleventh Amendment had any application to the bridge commission in the first place, the States had waived it upon entering into the compact. Three justices concurred on the express understanding that the Court did not reach



the question of the applicability of the Eleventh Amendment to agencies created by interstate compacts. Three dissenting justices construed the majority opinion as "acknowledging the applicability of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission . . . ." 359 U.S. at 283. The majority opinion, however, written by Justice Douglas, did not decide that question, nor indeed did it discuss it. Instead it "assume[d] *arguendo* that this suit must be considered as one against the states since this bistate corporation is a joint or common agency of Tennessee and Missouri," 359 U.S. at 279, and phrased the decisive question as "whether Tennessee and Missouri have waived their immunity under the facts of this case." 359 U.S. at 277. Finding that they had, the majority opinion did not reach the applicability issue.

Nevertheless, the Court of Appeals in this case read *Petty* as deciding that the Eleventh Amendment applies to all bi-state and multi-state agencies created under the compact clause, absent a waiver by the compacting states of the immunity it provides. Conceding that the three concurring justices had expressly reserved that question, it nevertheless believed the majority opinion had answered the question *sub silentio*, in spite of the clear statement in the opinion that that answer was merely assumed for the sake of argument. Adding the three justices of the majority opinion to the three dissenters,[16] the Court of Appeals found a six-justice majority in support of the proposition that every bi-state or multi-state agency is entitled to Eleventh Amendment protection. (See App. A, pp. 7-8)

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16. The Court of Appeals ignored the fact that the dissenting opinion referred only to the applicability of the Amendment "to the Tennessee-Missouri Bridge Commission," not to bi-state agencies as a class.

Such a reading of *Petty* is clearly wrong.[17] Nevertheless even assuming *arguendo* that this Court's opinion is sufficiently ambiguous to allow the Court of Appeals' construction, the question is one this Court should now authoritatively settle. In the 19 years since *Petty,* Congress has consented to more than 25 additional compacts, most of them creating agencies to administer their provisions; in addition, a number of other compacts have been proposed and are under consideration. Given the broad sweep of their functions and the numbers of persons affected by their operations, the status of these agencies under the Eleventh Amendment should not continue to be governed by a decision of this Court in which the issue was not addressed, was decided *sub silentio,* if at all, and was, after all, unnecessary to the decision of the case.

Because this Court has never settled whether a multistate agency can be immune from suit under the Eleventh Amendment, it has never indicated whether the lower courts in reaching an answer to that question should consider the same sorts of factors that are used in determining the Eleventh Amendment status of intrastate agencies. This question was presented in *Petty,* but because the Court did not reach the issue of the applicability of the Eleventh Amendment, it gave no indication of an answer. The question is one of vital importance to TRPA, against

17. Petitioners are not alone in reading *Petty* differently from the Court of Appeals. See *Byram River v. Village of Port Chester, New York,* 394 F. Supp. 618 (S.D.N.Y. 1975). There Judge Knapp, in deciding whether the Interstate Sanitation Commission, created by compact between New York, New Jersey, and Connecticut, was immune from suit under the Eleventh Amendment, stated that "the Supreme Court has never addressed itself to . . . whether multi-state agencies in general have Eleventh Amendment protection . . . . [In *Petty*] the Court specifically avoided the issue." 394 F. Supp. at 626. Judge Knapp, after analyzing the relationship of the Commission to New York, held that it was not entitled to Eleventh Amendment protection.



which numerous other suits are now pending in the district courts and the Ninth Circuit Court of Appeals. It is equally important to many similar agencies created by compact that are now involved in and may anticipate litigation. Finally, it is also important to the states and to Congress in creating such interstate agencies. It is a question this Court should decide.—

### B. THE COURT OF APPEALS' DECISION APPLYING THE ELEVENTH AMENDMENT TO ALL INTERSTATE AGENCIES AS A CLASS CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF THE SECOND AND EIGHTH CIRCUITS.

This Court's review of the Court of Appeals' decision is all the more imperative because the decision below conflicts with applicable decisions of this Court, including *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); with that of the Second Circuit in *Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2d Cir. May 27, 1977); and with that of the Eighth Circuit in *Petty v. Tennessee-Missouri Bridge Commission,* 254 F.2d 857 (8th Cir. 1958), *reversed on other grounds,* 359 U.S. 275 (1959).

The Court of Appeals here held that the Eleventh Amendment applies uniformly to all actions in federal court against multi-state agencies created by compact, relying on its incorrect reading of *Petty, supra.* (See App. A, pp. 7-8) In doing so, it went much further than even the dissenting justices in *Petty,* who read the majority opinion only as "acknowledging the applicability of the provisions of the Eleventh Amendment *to the Tennessee-Missouri Bridge Commission.* . . ." (emphasis added) 359 U.S. at 283. It ignored the implication of that statement that the question is one to be decided in reference to the particular agency, as the Eighth Circuit did in the *Petty* case and the Second Circuit did in *Trotman,* both discussed

below. It also disregarded a body of law developed by this Court employed in deciding on a case-by-case basis whether particular actions against state agencies and their officers are actually actions against the state barred by the Eleventh Amendment.

Not every element of state government is entitled to Eleventh Amendment protection. It is well established that counties, municipal corporations, and other political subdivisions of a state do not enjoy the immunity it provides. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); see *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12 (1974). In *Mt. Healthy* this Court decided whether it applied to a local school board. In considering this question, it found

> "The issue here . . . turns on whether the [agency] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation *or other political subdivision* to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law." (emphasis supplied) 429 U.S. at 280.

It therefore looked to Ohio statutes providing that school districts are "political subdivisions" and to the board's power to issue bonds and levy taxes as a source of financing independent of the state treasury. Although the board was "subject to some guidance from the State Board of Education" and received "a significant amount of money from the State," this Court concluded that the school board was "more like a county or city than it is like an arm of the state," and accordingly refused it Eleventh Amendment immunity. 429 U.S. at 280.



The Eleventh Amendment analysis used by this Court in *Mt. Healthy* applies with equal force to an agency such as TRPA created by interstate compact. The Eighth Circuit clearly applied such an analytic approach in its decision in *Petty*. The Second Circuit has also done so in its opinion in *Trotman v. Palisades Interstate Park Commission, supra*. See pp. 18-19 below.

The Ninth Circuit stands in conflict with this Court and those Circuits in immunizing an entire category of agencies from suit.[18] It refused in this case to apply a similar analysis to TRPA, even though the Compact expressly provides that TRPA is a "separate legal entity" and is to be deemed a "political subdivision" for purposes of suit, in a paragraph of the Compact that expressly mentions suit in the federal courts. Indeed, the sole consideration of the specific status of the TRPA by the Ninth Circuit was a token reference to the decision of the Eighth Circuit in *Petty*, which

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18. A strong argument can be made that the Eleventh Amendment should not apply to any multi-state agency created by compact. It is one thing to say that disputes of a citizen with an agency created by a single state should be decided in that state's courts, not the federal courts. It is quite another to say that when a state combines with one or more other states to create such an agency, which exercises power beyond its borders and requires the consent of Congress, a dispute with the agency is still a matter for the state courts. It is not. It is a federal matter governed by the federal law of the compact, as the Ninth Circuit recognized in this case. See App. A, p. 14. To apply the Eleventh Amendment to a multi-state agency, as the Ninth Circuit did, is to relegate suits against that agency to the state courts. That requires the courts of one state to enter rulings and judgments against an agency that by hypothesis is an arm of at least one other sovereign state and perhaps several other states. Such functions are far more appropriately performed by a federal court.

These considerations were perhaps what the concurring justices in *Petty* had in mind in reserving the applicability issue, for it appears from the language they employed that the question they declined to decide was not whether the Eleventh Amendment applies to all bi-state agencies, but whether it applies to any of them.

dealt with an entirely different sort of agency and does not support the Ninth Circuit's decision. See p. 22 below.

In *Petty*, the Eighth Circuit faced "the question whether the [Tennessee-Missouri Bridge] Commission is an entity separate and apart from the States of Tennessee and Missouri" and was therefore immune from suit under the Eleventh Amendment. 254 F.2d at 859. In deciding this question, the Court considered the state character of the functions the commission was found to perform; its control by the governors of the compacting states; the fact that the bridge it built was to belong to the states when paid for; the commission's sources of financing; and the effect of a judgment against it on the governmental operations of the states. Because it found on the basis of this analysis that the commission was "an instrumentality of both Tennessee and Missouri and . . . not an entity separate and distinct from the States," it held the Eleventh Amendment applicable. 254 F.2d at 860.

The Second Circuit in *Trotman* took a similar analytic approach in deciding "whether the Eleventh Amendment immunity of the states from federal suit may be invoked by the [Palisades Interstate Park] Commission," a bi-state agency created by compact between New York and New Jersey. 557 F.2d at 38. It cited and acknowledged a passage from its earlier decision in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *reversed in part on other grounds*, 427 U.S. 445 (1976). There, ruling on the Eleventh Amendment's applicability to the Connecticut State Retirement Fund, it had stated:

> "In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an 'alter ego' of the state, a court must look to numerous factors, no one of which is conclusive [citations]. The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. [Citations] Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. [Citations]" 519 F.2d at 564-65.



After discussing some of these factors as they applied to the commission, the *Trotman* court found it immune under the Eleventh Amendment because

> " . . . an analysis of all the pertinent factors as set out in the compact and applicable New York laws leads us to the inevitable conclusion that in reality this suit against the Commission is one against the State of New York." 557 F.2d at 38.[19]

19. In the course of its discussion the Court noted, without comment, *Byram River v. Village of Port Chester, New York*, 394 F. Supp. 618 (S.D.N.Y. 1975), where that Court's analysis had resulted in no Eleventh Amendment immunity for a tri-state agency created by compact. See also *United States Steel Corporation v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973), where the court, ruling on a motion to dismiss denied Eleventh Amendment immunity to the Commission, created by agreement of 17 adopting states (at that time), on the ground that the compact had not been consented to by Congress and its validity was therefore at issue. It continued in dictum:

> "Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitled it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity." 367 F. Supp. at 113 (citations omitted).

A three-judge district court later decided that no Congressional consent was required, 417 F. Supp. 795 (S.D.N.Y. 1976), *affirmed*, — U.S. —, 46 U.S.L.W. 4115 (February 21, 1978).

The error of the Ninth Circuit's simplistic approach and the contrasting validity of the analytical approach employed by the Second and Eighth Circuits is highlighted by one of the interstate compacts referred to earlier, the New Hampshire-Vermont School District Compact, consented to by Congress in 1963. Pub. L. 88-177, 77 Stat. 332 (1963). That compact authorizes creation of an interstate school district for Hanover, New Hampshire, and Norwich, Vermont. If the Ninth Circuit's opinion is correct, that district is absolutely immune from suit in the federal courts as a result of the compact (which contains no provisions that could be construed as a *Petty* waiver). Neighboring districts performing precisely the same functions, however, are presumably subject to federal suit under the teachings of *Mt. Healthy*. There is no justification for such a disparity of treatment, where the sole difference between such districts is that some are created by one state acting alone while others are created by two states acting together.

### C. UNDER THE APPLICABLE STANDARDS, THE COURT OF APPEALS ERRED IN GRANTING THE TRPA IMMUNITY.

It is also clear here that under the proper analysis of the status of TRPA required by *Mt. Healthy*, *Petty* and *Trotman*, *supra*, TRPA is not entitled to Eleventh Amendment immunity. The Compact expressly establishes that TRPA is a "separate legal entity." (Compact, Art. III(a)). In addition, TRPA is deemed a "political subdivision" of the compacting states[20] for the purpose of suits in the federal courts:

> "Each [civil] action [to which TRPA is a party] shall be brought in a court of the state . . . where the property affected . . . is situated, *unless the action is brought in a federal court*. For this purpose, the agency shall be deemed a *political subdivision* of both the State of California and the State of Nevada." (emphasis supplied) (Compact, Art. VI(b)).

20. *Cf. Mt. Healthy*, 429 U.S. at 280: "Under Ohio Law the 'state' does not include 'political subdivisions' and 'political subdivisions' do include local school districts."



Thus, the Compact itself answers the question whether TRPA is to be treated as "a municipal corporation or other political subdivision" (429 U.S. at 280) which is not immune from suit. It expressly provides that it is to be so treated.

The Compact's other provisions confirm that TRPA is not an arm of the states. The functions TRPA performs including the land use regulation at issue here are ones traditionally performed by local government. A majority of the members of the governing body (six of ten voting members) are appointed by *counties and cities* rather than the states (Compact, Art. III(a)); ten of the 17 members of the Advisory Planning Commission specified in the Compact are also associated with local agencies, and four others are to be residents of the region, while only one is from state government (Compact, Art. III(h)). The Compact also provides that TRPA's funding is to be paid by the counties rather than the states.[21] (Compact, Art. III(a)). Indeed, the Compact expressly insulates the states from liability, providing that "[n]o obligation contracted by the Agency shall bind either of the party states or any political subdivision thereof." (Compact, Art. VII (f)).

Both the compacting states, moreover, have vigorously contended in this and related litigation that TRPA is not an arm of either state. As the State of California put it,

21. TRPA may also collect fees for services rendered and is authorized to accept gifts, donations, subventions, grants, and other financial aid and funds. (Compact, Art. VII(b) and (d)).

TRPA is "no more a California State agency than are the City of Los Angeles or the County of Placer. . . . [I]t is separate and distinct from the state, rather than being one of its arms. . . ." Nevada has taken the same position. See Appendix F. Even TRPA itself has not asserted that it is entitled to Eleventh Amendment immunity.

These factors all distinguish this case from the one the Eighth Circuit decided in *Petty*. The court there concluded that the bridge commission performed a state governmental function, providing bridges and highways. In contrast, TRPA performs traditionally local governmental functions. In *Petty*, the bi-state agency was governed by a body consisting entirely of appointees of the compacting states' governors, and its actions were subject to veto by the governors. TRPA, on the other hand, is governed by a body the majority of whose members are appointed by *local* governments. (Compact, Art. III(a)). Aside from bridge tolls, which were pledged for operating expenses and bond retirement, the bridge commission's only sources of operating revenues were the states and the federal government. (In *Trotman*, too, the commission's only revenues, aside from gifts, were appropriations by the legislatures and use fees, which were required to be turned over to the state treasury.) TRPA, however, is financed chiefly by the *counties*. (Compact, Art. III(a)).[22] Execution on a judgment against the commission, according to the Eighth Circuit, would have been on the bridge it operated, which was to belong to the states when bonded indebtedness was paid. No such factor is present here. The bridge commission was found by the court not to be

22. Even if TRPA received "a significant amount of money from the State," that would not be determinative. See *Mt. Healthy, supra*, 429 U.S. at 280.



"an entity separate and distinct from the States," 254 F.2d at 860. TRPA is expressly made a "separate legal entity," Compact, Art. III(a), and none of its obligations bind the states, Compact, Art. VII(f). In short, there is simply no operative similarity between the facts of the *Petty* case and the facts here, on which the Court of Appeals could have relied in its opinion below.

### D. THE COURT OF APPEALS ALSO ERRED IN DECIDING THAT THE ELEVENTH AMENDMENT WAS NOT WAIVED.

The Court of Appeals' decision below also conflicts with this Court's decision in *Petty* on the question of waiver. In *Petty*, this Court found waiver in a clause in the compact authorizing the bridge commission "to sue and be sued in its own name". The Ninth Circuit found no waiver here although the Compact contains similar provisions authorizing suit and *expressly mentioning the federal courts*. Compact, Art. VI(b), *supra*. In *Petty*, this Court also relied on a clause in the Congressional consent providing that nothing in the compact should "be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States. . . ." 359 U.S. at 277. The Ninth Circuit found no waiver here although the congressional consent contains a similar provision that nothing in the Act or Compact should "in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region. . . ." Pub. L. No. 91-148, § 3, 83 Stat. 360 (1969). The "powers of the United States" presumably include the judicial power; similarly, "the applicability of any law" presumably includes both constitutional provisions and the jurisdictional statutes for the federal courts. The opinion of the Court of Appeals below,

however, disregarded this provision of Congress' consent to the Compact. See App. A, pp. 11-12

These provisions bearing on waiver must also be construed in light of other provisions of the Compact, discussed above, indicating that the party states and Congress did not believe that the Eleventh Amendment would apply to TRPA in the first place. At the very least, these provisions must be construed as indicating an intention to waive any immunity that does attach to TRPA. Any other result renders meaningless the Compact's reference to suits in the federal courts. See *Edelman v. Jordan, supra,* 415 U.S. at 673: ". . . we will find waiver only where stated 'by the most express language *or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction*'" (emphasis supplied). These provisions must also be seen in light of the states' position that TRPA is not an arm of either state and TRPA's own failure to assert the Eleventh Amendment in any of the courts below, indicating that the agency itself never believed it had such immunity.

Finally, the Ninth Circuit's ruling entirely disregards the fact that these waiver provisions appear in an interstate compact approved by Congress. It should not be lightly inferred that Congress intended that suits against a multistate agency like TRPA should have to be brought in the state courts. That would lead to the anomaly of courts of one state adjudicating claims against an agency which is at least in part the agency of another state.[23] There is no indication that Congress and the compacting states intended such a result; in fact all indications, including the express terms of the Compact, are to the contrary.

• • •

23. See note 17, *supra.*



In summary, the result reached in the opinion below is in unresolvable conflict with applicable decisions of this Court, that of the Eighth Circuit in *Petty,* and that of the Second Circuit in *Trotman,* as well as with two decisions of the district courts in the Second Circuit. It differs from those decisions both in the test to be applied in reaching a decision on the applicability of the Eleventh Amendment to interstate agencies and in the result clearly indicated when the proper standard is applied in the context of this case. It also conflicts with this Court's decision in *Petty* on the issue of waiver. The decision should therefore be reviewed in this Court.

## II. The Decision Below, Granting Absolute Immunity to the Members of TRPA's Governing Body, Is Unprecedented in the Decisions of This Court and In Conflict With Decisions of Other Circuits.

The Court of Appeals ruled below that the members of TRPA's governing body are absolutely immune from suit to the extent their challenged acts were performed in a "legislative" capacity.[24] It characterized TRPA as a "regional legislature", created by California and Nevada because "the legislatures of either state could not deal effectively with problems that demand the consideration of a body which can weigh regional interests and wisdom." (App. A, p. 19) Referring to this Court's decisions granting members of Congress and state legislatures absolute immunity, *Doe v. McMillan,* 412 U.S. 306 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951), it "discern[ed] no reason why these 'regional legislators' should not be accorded the

24. The Court of Appeals agreed that TRPA's members are entitled to only a qualified immunity to the extent they were acting in an "executive" capacity.

same immunity as their state and national counterparts." (See App. A, pp. 18-19)

There are, however, substantial reasons why TRPA's members are not entitled to absolute immunity. TRPA's only resemblance to a state legislature is that it makes rules. Unlike a state legislature, it also has "executive" enforcement powers. (Compact, Art. VI(b)). Unlike a state legislature, it is not an elective body (Compact, Art. III(a)), and it exercises no plenary powers. (See Compact, Art. V and VI). It is, in short, an appointed administrative body, like many thousands of other administrative bodies and executive officials at all levels of government that exercise tiny segments of delegated rulemaking authority over specific subject matters in limited geographic areas.

The Ninth Circuit's extension of absolute immunity to the members of such an administrative body is unprecedented in the decisions of this Court. While this Court has found absolute immunity appropriate for state and federal legislators, *Doe v. McMillan, supra; Tenney v. Brandhove, supra,* and for judicial officers, *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Pierson v. Ray,* 386 U.S. 547 (1967), it has refused it to a state's highest executive officer, *Scheuer v. Rhodes,* 416 U.S. 232 (1974). It has never extended absolute immunity to officials of subordinate state agencies or political subdivisions such as TRPA, limiting such officials to a qualified immunity. *Procunier v. Navarette,* — U.S. —, 46 U.S.L.W. 4144 (February 22, 1978); *O'Connor v. Donaldson,* 422 U.S. 563 (1975); *Wood v. Strickland,* 420 U.S. 308 (1975).

In *Wood v. Strickland, supra,* this Court denied absolute immunity to the members of an elected local school board. Although acknowledging that "school board members function at different times in the nature of legislators and adjudicators" (420 U.S. at 319), it permitted them only a qualified immunity in administering discipline to a student, where presumably they acted in their judicial role. Nothing distinguishes TRPA members functioning "legislatively" from school board members functioning "judicially." Neither should be absolutely immune. Both should be entitled to the same qualified immunity which this Court carefully defined in *Wood.*



The Court of Appeals' decision is also in conflict with decisions of the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have given members of other comparable bodies only qualified immunity. *Williams v. Anderson,* 562 F.2d 1081 (8th Cir. August 31, 1977) (school board); *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976) (junior college board); *Jones v. Diamond,* 519 F.2d 1090 (5th Cir. 1975) (county supervisors); *Roberts v. Williams,* 456 F.2d 819 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971) (county supervisors); *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970) (presiding officer of "county fiscal court," a Kentucky legislative and administrative body); *Nelson v. Knox,* 256 F.2d 312 (6th Cir. 1958) (city commissioners); *Cobb v. City of Malden,* 202 F.2d 701 (1st Cir. 1953) (Magruder, C.J., concurring) (city council members). Even the Ninth Circuit has previously recognized that these bodies differ from federal and state legislatures, for in *Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976), it stated:

> "The absolute legislative immunity recognized in *Tenney v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), applied in that case to state legislators and not necessarily to those other state or local officials whose duties can be characterized as partially 'legislative'."

Justice Stewart, then a judge on the Sixth Circuit, summed it up twenty years ago in *Nelson v. Knox, supra:*

> "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators. . . .
>
> "It is our opinion that the defendants in this case were not clothed with complete immunity but enjoyed instead a qualified privilege." 256 F.2d at 314-15.

The Court of Appeal's decision granting the members of TRPA absolute immunity cannot be reconciled with these decisions.

Traditional historical concern for the parliamentary freedom of an elected representative body from interference by the executive and the judiciary justifies absolute immunity for members of Congress and state legislatures. See *Tenney v. Brandhove, supra,* 341 U.S. at 372-76. TRPA's activities, however, raise no more of these concerns than do the activities of hundreds of other state regulatory agencies and political subdivisions. Its case, in fact, is similar to, although weaker than, that of city councils, county boards of supervisors, and local school boards given only qualified immunity in the decisions of other Circuits, for it is very much like them. It is made up chiefly of local officials, is financed by local governments, and exercises its limited rulemaking powers in a localized area. See pp. 20-21, above. If TRPA is a "regional legislature," then these boards and councils are "local legislatures" entitled to the same absolute protection. The only thing that distinguishes them from TRPA in this regard is that their members are at least elected, while TRPA's are appointed.

Under the decisions of this Court and of other Circuits, the liability of all these officials should be governed by the



same rule of qualified immunity. Because the Ninth Circuit's decision is inconsistent with those decisions and raises significant questions concerning the immunity available to administrative officials, it should be reviewed in this Court.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: March 20, 1978

Respectfully submitted,

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## *Appendix A*

### Court of Appeals' Decision

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Nos. 75-2400, 76-1182, 76-1289 and 76-1608.
United States Court of Appeals, Ninth Circuit.
Dec. 21, 1977.

Appeals from the United States District Court for the Eastern District of California.

Appeal from the United States District Court for the District of Nevada.

Before WRIGHT, GOODWIN, and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

## I.

## THE TAHOE REGIONAL PLANNING COMPACT

Some background information is necessary for an understanding of this opinion. In 1968, California and Nevada entered into a compact to create a regional agency with power to regulate and control development within the Lake Tahoe Basin. Cal. Gov't Code § 66800 *et seq.* (West Supp. 1974); Nev.Rev.Stat. § 277.190 *et seq.* (1973). Congress consented to the Tahoe Regional Planning Compact (hereinafter "the Compact") in December 1969.[1] Pub.Law 91-148, 83 Stat. 360 (1969).

The governing body of the Tahoe Regional Planning Authority (hereinafter "the TRPA") was charged with adopting ordinances, rules, regulations and policies to effectuate a regional plan setting minimum standards for water purity, zoning, shoreline development and the like.[2] The TRPA enacted a comprehensive Land Use Ordinance which limited the permitted uses of certain lands within the Basin, including those owned by appellants.

Land belonging to appellants and previously zoned as residential, multiple residential, or commercial was rezoned

1. Article I, § 10, cl. 3, of the United States Constitution provides in part:
   "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."
2. Compact, Art. VI(a).



as "General Forest District,"[3] "Recreation District,"[4] and "Conservation Reserve."[5] Generally, the ordinance allowed very limited residential use, and no tourist residential or commercial use, of the rezoned land. Other permitted uses included hiking trails, campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing and electrical substations. In addition, outdoor recreation concessions and educational facilities were allowed in the "Recreation District."

Appellants complain that the land use ordinance constituted an inverse condemnation, or a "taking," of their property. Basing their claims on the Fifth and Fourteenth Amendments to the United States Constitution and on the just compensation clauses of the constitutions of California and Nevada, they sought injunctive, declaratory and monetary relief against a variety of defendants, including the TRPA, its executive director and members of its governing board, several counties in the Lake Tahoe Basin, the states of California and Nevada, and the United States.

The district courts dismissed the suits for a variety of reasons. On appeal we rendered an opinion on August 5, 1977. On petition for rehearing, and responses thereto, we withdraw our opinion of August 5th, and issue the following opinion in its place. The petition for rehearing is otherwise denied.

## II.

## THE CAUSES OF ACTION

Before we can ascertain whether appellants' complaints should have withstood the motions to dismiss below, we

3. TRPA Ordinance No. 4, § 7.20.
4. *Id.* at § 7.30.
5. *Id.* at § 7.110.

must determine under what theories appellants might have proceeded to trial. First, we consider the causes of action grounded on the just compensation provisions of the constitutions of California and Nevada.

By consenting to the Compact, Congress transformed the contract between the two states into federal law. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 & n. 13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975). Although the TRPA must be considered an agency of the contracting states, it operates under the aegis of federal law. Consequently, causes of action based on the state constitutional provisions must fail because the Compact, as federal law, preempts state law.

Appellants also challenged the TRPA's ordinance under the due process clause of the Fourteenth Amendment to the United States Constitution, alleging arbitrary and oppressive state action. We think that a cause of action rooted in the Fourteenth Amendment may be appropriate since the TRPA is, in effect, an agency of the contracting states.[6] It would be unreasonable to allow states to avoid the constraints imposed by the Fourteenth Amendment simply by joining forces with each other. Such an aggregation of state power makes the need for those constraints even more pressing.

Finally, appellants challenge appellees' actions under the due process and just compensation clauses of the Fifth Amendment. Since the Compact is federal law, *League to Save Lake Tahoe v. TRPA, supra*, resort to the Fifth Amendment as well is proper.

We find, however, that a cause of action for inverse condemnation under the just compensation clause cannot be stated against the TRPA, its executive director or members

6. See *infra*, p. [7].



of its governing board because they lack condemnation authority.[7]

Appellants do allege facts sufficient to support a claim under the due process clause.[8] As the Supreme Court has stated:

> Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.

*Hurtado v. California*, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884). The Compact is a "law of the land," deriving its authority from powers conferred upon Congress by the Constitution. The due process clause was intended to protect the liberty and property interests of individuals from invasion by the arbitrary and oppressive exercise of power by the federal government. Since appellants allege such an invasion of their property interests,

7. TRPA was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. *Western Union Tel. Co. v. Penn. R. R.*, 195 U.S. 540, 569, 25 S.Ct. 133, 49 L.Ed 312 (1904). *See also Hudson Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm'n*, 206 U.S. 1, 20, 27 S.Ct. 585, 51 L.Ed. 933 (1907). The delegation of police power to TRPA was neither an express grant of condemnation power nor one by implication.

8. It is not inconsistent to find that both the Fourteenth and Fifth Amendments can support a cause of action against the same defendants. As noted, this case concerns a bi-state compact, that "centaur of legislation" which is an offspring of both state and federal law. *See* Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo.L.J. 87, 110 (1975). The two causes of action, however, substantially overlap.

they have stated a cause of action under the Fifth Amendment.[9]

## III.

## LIABILITY OF THE TRPA

We turn now to the liability of the TRPA, the only defendant against whom the district courts did not dismiss the suits.

The Compact evidences a delegation to a separate legal entity of authority ordinarily residing in each of the two

9. Under the strict standard of pleading called for by *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 (1935), none of the complaints in any of the cases on appeal would withstand a motion to dismiss. They lack specific factual allegations which, if proved, would rebut the presumption of constitutionality that the *Pacific States* Court accorded acts of administrative and legislative bodies.

Although *Pacific States* has never been explicitly overruled, we do not believe that it represents the present state of the law because it was decided two years before the promulgation of the Federal Rules of Civil Procedure. We find no precedent in the Ninth Circuit applying *Pacific States* to an analogous case since the Rules took effect.

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court explained the modern philosophy of pleading:

> "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

*Id.* at 47-8, 78 S.Ct. at 103 (citations omitted).

Thus a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A Moore's Federal Practice ¶ 12.08 (1975).

The allegations of "taking," even though phrased in terms of inverse condemnation, are sufficient to show that appellants complained that the TRPA exercised its police powers improperly, and that they relied on the due process clauses of the Fifth and Fourteenth Amendments.



states. With Congress' constitutionally required approval, the TRPA exercises a species of state authority. In effect, the bi-state Authority serves as an agency of the participant states, exercising a specially aggregated slice of state power.[10] As such, it would appear that the TRPA is protected by sovereign immunity, preserved for the states by the Eleventh Amendment.

The Supreme Court indicated as much in *Petty v. Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). Although the defendant was a bi-state corporation created by compact, Justice Douglas, writing for three Justices in the majority, phrased the issue in a telling manner: "The question here is whether *Tennessee* and *Missouri* have waived their immunity under the facts of this case." 359 U.S. at 277, 79 S.Ct. at 787 (emphasis added). The Court allowed the suit to lie against the *bi-state corporation* because it found that the constituent states had expressly waived *their* immunity.

Admittedly, the six-Justice majority was evenly divided on the "constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created . . . under state compacts." Without indicating any doubt as to the wisdom of finding an Eleventh Amendment immunity for bi-state corporations, three concurring Justices felt that it was unnecessary, given the finding of waiver, to reach the constitutional question.

10. *See generally*, R. Leach & R. Sugg, Jr., The Administration of Interstate Compacts 22 (1959):

> "Agencies established by interstate compact are identified administratively with the party states rather than with the federal government. They may develop close relations with federal departments . . . but they are no more a part of the federal administrative organization than any ordinary department of a state government."

But *Petty's* precedential value is strengthened by the three Justices in dissent. With Justice Frankfurter writing, they concurred in what they understood to be "[t]he Court['s] acknowledg[ment of] the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission." They limited their dissent to the finding of waiver.

The final tally has six Justices, along with the Court of Appeals for the Eighth Circuit, agreeing that bi-state compacts do preserve Eleventh Amendment immunity for entities created under them. Three Justices did not reach the question. None argued that the Eleventh Amendment does not apply.

Following the precedent of *Petty*, we conclude that the TRPA is immune from suit under the Eleventh Amendment so long as the states have not waived their immunity as to suit against the entity which they created. Moreover, even did we not consider ourselves bound by *Petty*, we still would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Com'n*, 254 F.2d 857 (8th Cir. 1958).

We find in another part of this opinion that the states which joined in the Compact did not waive their immunity so as to allow suit against the TRPA.[11]

While adhering to the Eleventh Amendment, the federal courts have preserved for themselves the power to enjoin state officers from enforcing unconstitutional state laws. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), an opinion defining the scope of the power preserved under *Ex parte Young*, the Supreme Court acknowledged the continuing force of that doctrine,

11. *See infra*, pp. [10-12].



choosing merely to limit it to the issuance of prospective equitable relief. 415 U.S. at 677, 94 S.Ct. at 1362.

Thus, plaintiffs in this case can maintain a suit for injunctive and declaratory relief against the officers of the TRPA, an offspring of the states of Nevada and California. Their potential relief must be limited to prospectively enjoining enforcement of the allegedly unconstitutional land use ordinance,[12] and a declaration of their rights with respect to it.

## IV.

## LIABILITY OF THE DEFENDANTS OTHER THAN THE TRPA

Appellants also appeal from the district courts' dismissals of the other defendants. Among them were counties in the Lake Tahoe area, the states of California and Nevada, the United States, and the executive director and members of the governing body of the TRPA.

### A. *THE COUNTIES.*

The only possible cause of action against the counties would be one to enjoin their enforcement of the challenged ordinance. As to monetary and declaratory relief, the action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of the TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cities, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

Moreover, there is no evidence that the counties would attempt to enforce the challenged ordinance were the court

12. Since Jacobson is no longer the owner of property affected by the ordinance, the district court properly dismissed his equitable claims. *See infra*, [pp. 21-22].

to declare it unconstitutional. It appears that the counties even look with favor on appellants' development plans. Hence, the district courts were not required to join the counties as necessary defendants pursuant to Fed.R.Civ.P. 19(a).

We conclude that it was not error to dismiss the suits as against the counties.

B. *THE STATES.*

California and Nevada were also joined as defendants, either on the theory that the TRPA was a political subdivision of the states, or alternatively that the zoning was a joint undertaking by the states and the TRPA. The district judges did not decide these issues, holding instead that any adjudication of condemnation would mean that the TRPA had exceeded the authority delegated to it and thus its actions would not be regarded as those of the states.[13]

We decide on another ground that the states are not proper parties.[14]

The Eleventh Amendment immunizes a state from suits brought in federal court by the state's own citizens as well as by citizens of a foreign state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Although this is an immunity which the state may waive at its pleasure, the conclusion that there has been a waiver of immunity from suit will not be lightly inferred. *Petty v. Tennessee-*

13. *See Western Int'l Hotels v. TRPA*, 387 F.Supp. 429, 439 (D.Nev.1975).

14. This court may affirm on any ground squarely presented on the record. *Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); *M. O. S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967). The issue of the Eleventh Amendment as a bar to suing the states was raised by at least one party below.

Even had it not been, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it would be proper to consider it for the first time on appeal. *See Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945).



*Missouri Bridge Com'n*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959).

Relying on *Petty*, appellants allege that California and Nevada waived their immunity to suit by enacting the Compact. In *Petty*, Congress approved a compact between Tennessee and Missouri containing a clause giving the Commission the right "to sue and be sued." Appellants seem to consider this language analogous to certain language in the Compact.

The difference between *Petty* and this case is that in *Petty* Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that

> [I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.

359 U.S. at 281-82, 79 S.Ct. at 790.[15]

Discussing *Petty* in *Edelman v. Jordan, supra*, the Supreme Court emphasized that

> The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question and whether the State by its participation in

15. For evidence that there can be considerable doubt as to the meaning of a sue-and-be-sued clause, see the discussion in *Petty*, 359 U.S. 275, 283-89, 79 S.Ct. 785 (Frankfurter, J., dissenting).

the program authorized by Congress had in effect consented to the abrogation of that immunity.

415 U.S. at 672, 94 S.Ct. at 1360.[16]

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, if there has been a waiver, it must be found in the language of the Compact itself.

At oral argument, counsel argued that Article VI(b) of the Compact constituted a waiver of immunity. Their attempt to draw an analogy between that provision and the sue-and-be-sued clause in *Petty* seems to us somewhat contrived. Article VI(b) provides, in part, that the TRPA will be deemed a political subdivision of both states for purposes of suit. When read in conjunction with Article III(a), which provides that the TRPA is a separate legal entity, it appears that Article VI(b) was intended only to operate as a grant of state court jurisdiction over the TRPA. The provision admittedly is not without ambiguity,[17] but since waiver should not be lightly inferred, *Petty*, 359 U.S. at 276, 79 S.Ct. 785, we hold that there was no waiver.

C. *THE UNITED STATES.*

The United States was named as a defendant in No. 76-1608. That case was originally instituted in the California

16. *See also League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 & n.13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).

17. Article VI(b) commands that suit should be brought in a court of the state where the violation was committed or where the property is located "unless the action is brought in a federal court." The reference to suit in a federal court admittedly is ambiguous, but we do not understand it to constitute a waiver of immunity. The phrase may refer to diversity suits or to suits by the TRPA against the United States under the Tucker Act. 28 U.S.C. §§ 1346, 1491 (1970).



Superior Court and was removed to the federal court. The district court dismissed the United States from the action, finding that the TRPA was not an agency of the United States.

There is no language in the Compact indicating that Congress gave its consent to allow suit against the United States. Without its consent, the United States cannot be sued. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

Moreover, although Congress, in the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1970), waived sovereign immunity for certain claims and granted jurisdiction over them to federal district courts and the Court of Claims, it did not subject the United States to suit in a state court. Appellants brought this suit in a state court. Since the state court lacked jurisdiction, this federal court acquired none upon removal, *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939), even where we would have had jurisdiction had the suit been commenced here. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922).

Finally, the United States has an extremely limited involvement with the Compact. First, Congress consented to it. Second, as a condition of that consent, Congress insisted that the President of the United States be allowed to appoint a single non-voting representative to the governing body. Pub. L. No. 91-148, Art. 8(d) § 3, 83 Stat. 360 (1969). We agree with the district court that the approval of the Compact by Congress and the limited appointment power of the President do not thereby establish the TRPA as an agency of the United States.

The district court properly dismissed the suit as against the United States.

D. *THE EXECUTIVE DIRECTOR AND MEMBERS OF THE GOVERNING BOARD OF TRPA.*

The individual members of the TRPA's Governing Board and its Executive Director[18] were named as defendants in No. 76-1289. They allegedly violated appellant's constitutional rights by enacting and implementing the General Plan and Land Use Ordinance. The district court dismissed the complaint as to these defendants,[19] holding that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions."

Before addressing the immunity issue, we must examine the jurisdictional basis of the action against these defendants. Appellant alleged jurisdiction under two statutes, 28 U.S.C. §§ 1331 and 1343. Section 1343 is the jurisdictional statute for civil rights actions arising under 42 U.S.C. § 1983 (1970). In order to establish a claim cognizable under § 1983, appellant must show that he has been deprived of a right secured by the Constitution and that such deprivation was achieved under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 94 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

In *League to Save Lake Tahoe*, 507 F.2d at 519-24, a case concerning the same bi-state Compact involved here, this court held that "[c]ongressional consent transforms the compact into a law of the United States." Since the challenged actions were taken by the individual officers pursuant to authority conferred by the Compact, the alleged

18. For brevity, the executive director and members of the governing board will be referred to as "officers" of the TRPA.

19. The suits against defendants Doug Leisz and Jack W. Deinema were dismissed voluntarily. C.T. 236-37.



deprivation of constitutional rights could not have been under color of state law.[20]

This court thus has no jurisdiction under § 1343, but appellant also relied on federal question jurisdiction under § 1331, which provided the jurisdictional basis for *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The Court in *Bivens* fashioned a cause of action against federal officers for a violation of the Fourth Amendment. The Court implied a damages remedy directly from the Constitution, viewing it as an unsurprising remedy solidly rooted in history.[21]

Since appellant's claim is based on the Fifth, rather than the Fourth, Amendment, we must determine whether the rationale of *Bivens* can be extended to Fifth Amendment claims.

Although the question whether to limit the applicability of *Bivens* to the Fourth Amendment has apparently not been decided by this circuit,[22] most courts of appeals have held that the remedy is not so limited.[23]

20. This is not inconsistent with our earlier finding of state *action* to support a cause of action under the Fourteenth Amendment. The jurisdictional standard under §§ 1983 and 1343 is that there must be a deprivation of constitutional rights "under color of state *law*." (Emphasis added.) While the TRPA exercises the power of the constituent states, it does so pursuant to federal law.

21. 403 U.S. at 395-96, 91 S.Ct. at 2004, *quoting from Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

22. In *Mark v. Groff*, 521 F.2d 1376, 1378 n.1 (9th Cir. 1975), the court noted that the question of a damages claim was not raised and the court chose to take no position on the question.

23. The following cases have extended the applicability of *Bivens*, or have indicated that they look with favor on such an ex-

We believe that this is the better view. The due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment. Nothing in *Bivens* warrants limitation to Fourth Amendment claims; its rationale clearly supports extension to cases of this sort.

Having found jurisdiction under § 1331, we turn now to the immunity issue. We note at the outset that the major difference between a § 1983 claim and a *Bivens* claim is that, where the constitutional infringer has acted under color of state law, § 1983 is applicable and where the constitutional infringer acts under color of federal law, a *Bivens* action can lie. In *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975), this court announced that

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tension: *Gagliardi v. Flint*, 564 F.2d 112 (3rd Cir. 1977); *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977) (extending *Bivens* to cover Fifth Amendment due process); *Rodriguez v. Ritchey*, 539 F.2d 394 (5th Cir. 1976) (extending to cover investigatory officers who did not participate in the actual arrest); *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976) (retaliatory IRS investigation could give rise to a *Bivens* action); *Paton v. La Prade*, 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) (favorable dictum); *States Marine Line, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) (customs officers liable for improper performance of duties—Fifth Amendment due process); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (extended to Fifth Amendment fair trial rights); *Butler v. United States*, 365 F.Supp. 1035 (D.Hawaii 1973) (First Amendment); *Washington v. Brantley*, 352 F.Supp. 559 (M.D.Fla. 1972) (favorable dictum).

The following courts have limited *Bivens* to Fourth Amendment cases: *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977); *Smothers v. Columbia Broadcasting System*, 351 F.Supp. 622, 626 n.4 (C.D.Cal. 1972); *Davidson v. Kane*, 337 F.Supp. 922 (E.D.Va. 1972).

The Second Circuit considers the question still open. *Wahba v. New York University*, 492 F.2d 96 (2nd Cir.), *cert. denied*, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974). *But see Brault v. Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975) (Fourteenth Amendment due process violation "comes within *Bivens*' sweeping approbation of constitutionally-based causes of action.").



> [W]e agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in § 1983 suits. (Citations omitted.)

We thus turn to § 1983 law to determine the applicability and extent of the immunity doctrine as it relates to the officers of the TRPA. In dealing with the immunity doctrine, courts have established three functional classifications: judicial, *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); executive, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); and legislative, *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). We must determine which, if any, of the classifications applies to these appellees. We begin with an examination of the powers accorded them under the Compact.

To effectuate its purposes, the Compact mandated that "[w]ithin 90 days after the formation of the agency, the governing body shall adopt a regional interim plan" and that "[w]ithin 18 months after the formation of the agency, the governing body shall adopt a regional plan."[24]

Article VI of the Compact grants specified powers to the TRPA and its officers. Section (a) provides that "[t]he governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans"; section (b) provides that "[a]ll ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency"; and section (e) provides that "[t]he agency shall police the region to ensure compliance with the general plan and adopted ordinances,

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24. Compact, Art. V(b) & (d).

rules, regulations and policies." In addition, Article V(c), and (f) granted the TRPA enforcement powers necessary to implement the interim plan and the regional general plan.

Thus, the agencies possess both legislative (adoption of ordinances, etc.) and executive (enforcement) powers. The immunity accorded to those acting in the different capacities is not identical.[25]

Absolute immunity is given to legislators for actions performed in their legislative function. *Tenney v. Brandhove, supra; Doe v. McMillan,* 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973). Executive officers were given only a qualified immunity for their actions varying with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time" in question. *Scheuer v. Rhodes,* 416 U.S. at 247, 94 S.Ct. at 1692. *See also Navarette v. Enomoto,* 536 F.2d 277 (9th Cir. 1976), *cert. granted,* 429 U.S. 1060, 97 S.Ct. 783, 50 L.Ed.2d 776 (1977) (No. 76-446); *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975).

The problem in the present case is that we cannot tell from the state of this record whether the acts complained of arose by virtue of the officers' exercise of their legislative or executive powers. Because of our uncertainty on this issue, we remand to the district court for further factual development as to the nature of the challenged actions.

We do offer some guidelines for the district court on remand. We are fully aware that under § 1983 absolute immunity has been recognized only for state and federal legislators. *Doe v. McMillan, supra.* The question of immu-

25. *E. g., Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976). We presume that the executive director acted only in an executive capacity. The more complicated question involves only members of the governing board.



nity for officers acting under the authority of an interstate compact has not been squarely addressed, but we believe that such compacts, by their very nature, establish regional legislatures. In an area such as the Lake Tahoe Basin the legislature of either state could not deal effectively with problems that demand the consideration of a body which can weigh regional interests and wisdom.[26] We discern no reason why these "regional legislators" should not be accorded the same immunity as their state and national counterparts.

For parallel reasons, we also believe that these officers, as executives, might be given the same qualified immunity that the Court granted state executive officers in *Scheuer v. Rhodes, supra.* If the only complaint, as it relates to their executive function, is their enforcement of the challenged ordinance, such immunity would absolve the officers from liability. Therefore, appellant would have to show something more than evenhanded enforcement by the defendants of an ordinance with which he disagrees.

More specifically, we think the guidelines found in *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1974), are applicable. The Court held that a school board member is not immune from liability for damages if

> [h]e knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious

26. *See,* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685 (1925):

> "Legislation is the answer and legislation must be coterminous with the region requiring control. . . . The regions are less than the nation and are greater than any one state. The mechanism of legislation must therefor be greater than that at the disposal of a single state."

intention to cause a deprivation of constitutional rights or other injury to the student.

420 U.S. at 322, 95 S.Ct. at 1001.

Similar analysis has been employed in the land use context. In *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976), Cordeco owned commercially valuable dunes in Puerto Rico. Defendant officers of the Commonwealth took no action on Cordeco's petition for a permit to extract sand, while granting permits to an adjoining and politically influential landowner. The court upheld imposition of liability as to "these two defendants [because they] were not acting within the scope of their lawful discretion or authority in refusing to process Cordeco's application." Indeed, the court concluded that defendants had "acted maliciously and wantonly, and with illegitimate 'political' or, at least, personal motives . . . ."

It is this kind of showing which must be made to create liability under *Bivens* as to the executive director or governing board members of the TRPA, at least to the degree that they acted in their executive capacity. And, as already discussed, to the degree that they acted in their legislative capacity, they have an absolute immunity from suit.

We recognize that the executive director and members of the governing board face a difficult task in trying to regulate and control development in the Lake Tahoe Basin. By subjecting them to possible liability under *Bivens* we would hold them responsible for their actions being mindful, however, that they must have wide latitude in the responsible, good-faith exercise of their authority. By limiting their liability to instances such as those discussed in *Wood v. Strickland* and *Cordeco Development Corp. v. Santiago Vasquez*, we think that sincere, well-meaning officials need not fear the threat of suit.



The immunity afforded governmental officers for damage suits does not defeat a claim for equitable relief. *Safeguard Mutual Insurance Co. v. Miller*, 472 F.2d 732 (3d Cir. 1973). Appellant has asked for affirmative injunctive and declaratory relief against the officers. He asks the court to order the members of the governing board to repeal the existing ordinance and to enact a new ordinance permitting their proposed developments.

Principles of federalism counsel against such affirmative intrusion into the executive branch of an agency of state or local government. *Rizzo v. Goode*, 423 U.S. 362, 380, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Those principles apply with equal force to the TRPA, a hybrid regional body both legislative and executive in nature. Any equitable relief granted in this case must be limited to what is absolutely necessary to redress the appellant's rights. Under the doctrine of *Ex parte Young, supra*, prohibitory injunctive relief against the enforcing officers is allowed.[27] Declaratory relief may also be granted if it is limited so as not to interfere excessively with the TRPA's

"latitude in the 'dispatch of its own internal affairs.'"

*Cafeteria Workers v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961), *quoted in Sampson v. Murray*, 415 U.S. 61, 83, 94 S.Ct. 937, 949, 39 L.Ed.2d 166 (1974), *requoted in Rizzo v. Goode*, 423 U.S. 362, 378-79, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

## V.

## JACOBSON'S STANDING

The district judge in No. 75-2400 dismissed Jacobson's suit for lack of standing. In bankruptcy proceedings initi-

27. *See supra*, pp. [8-10].

ated subsequent to enactment of the challenged ordinance, Jacobson's interest in the affected property was assigned to another entity.

Only the present owner of land has standing to ask for equitable relief setting aside the zoning of his land. Hence, although Jacobson claims that he "retained" this cause of action, he could only have retained a claim for monetary relief. Since the record does not support Jacobson's contention, a position contrary to general principles of bankruptcy law, we hold that the district court properly dismissed his suit for lack of standing.

The four cases reviewed are affirmed in part, reversed in part, vacated in part and remanded for further consideration consistent herewith.



## *Appendix B*

### Order Denying Rehearing

United States Court of Appeals, Ninth Circuit.

ORDER

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Before: WRIGHT, GOODWIN and ANDERSON, Circuit Judges.

The petitions for rehearing are denied.

The opinion filed on December 21, 1977, is corrected in the following particulars:

Add to footnote 14, p. 3313 of the slip opinion:

> We believe that the Eleventh Amendment's jurisdictional nature also justified our raising the issue *sua sponte*.

Delete the sentence beginning on the bottom line, p. 3312 [p. 10], reading: "Hence, the district courts were not required to join the counties as necessary defendants pursuant to Fed. R. Civ. P. 19(a)."



## *Appendix C*

### Court of Appeals' Withdrawn Decision

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Nos. 75-2400, 76-1182, 76-1289 and 76-1608.

United States Court of Appeals, Ninth Circuit.

Aug. 5, 1977.

Appeals from the United States District Court for the Eastern District of California.

Before WRIGHT, GOODWIN and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:*

On this appeal we are once more concerned with that "centaur of legislation,"[1] an offspring of both state and federal law, the Tahoe Regional Planning Compact ("Compact"). Appellants complain that zoning ordinances of the Tahoe Regional Planning Agency ("TRPA"), a separate legal entity created under the provisions of the Compact, amount to an inverse condemnation or "taking" of their lands.

In each of the four consolidated cases presently on appeal, the underlying complaint was dismissed by the district court for failure to state a claim upon which relief can be granted.[2] Additionally, some defendants were dismissed from each suit. Each determination is appealed. We vacate two judgments, two others we affirm in part and reverse in part, and all four appeals are remanded for further proceedings.

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*Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

1. Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo.L.J. 87, 110 (1975).

2. Although the ultimate outcome was the same, the basis for dismissal varied among the consolidated cases. In *Jacobson v. TRPA*, No. 75-2400, the district judge held that Jacobson had not set forth facts sufficient, if proved, to rebut the presumption of constitutionality accompanying the acts of the TRPA. See *Western International Hotels et al., v. TRPA et al.*, 387 F.Supp. 429 (D. Nev. 1975). Jacobson amended his complaint but his suit was subsequently dismissed for lack of standing.

The other three cases on appeal were disposed of in one unreported consolidated opinion in which the district court ruled that, although the complaints stated facts sufficient for an action of inverse condemnation, such an action could not be brought against the TRPA because it lacked authority to condemn.



## I.

## THE TAHOE REGIONAL PLANNING COMPACT

Some background information is necessary for an understanding of this opinion. In 1968, California and Nevada entered into a compact to create a regional agency with powers to regulate and control development within the Lake Tahoe Basin. *Cal.Gov't Code* § 66800 *et seq.* (West Supp. 1974); *Nev.Rev.Stat.* § 277.190 *et seq.* (1973). The Compact was consented to by Congress in December 1969.[3] Pub.Law 91-148, 83 Stat. 360.

The governing body of the TRPA was charged with adopting ordinances, rules, regulations and policies to effectuate a regional plan setting minimum standards for water purity, zoning, shoreline development and the like.[4] The TRPA enacted a comprehensive Land Use Ordinance ("LUO"), effective February 10, 1972, in discharge of its duties under the Compact. This LUO limited the permitted uses of certain lands within the Basin, including those owned by appellants.

Under the LUO, "use districts" were established.[5] Land belonging to appellants and previously zoned as residential, multiple residential, or commercial was rezoned as "General Forest District,"[6] "Recreation District,"[7] or "Conservation

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3. Article I, § 10 cl. 3 of the United States Consitution provides in part:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."

4. Compact, Art. VI(a).

5. TRPA Ordinance No. 4, section 7.00.

6 *Id.* section 7.20.

7. *Id.* section 7.30.

Reserve."[8] As a generalization, very limited residential and no tourist residential or commercial use was to be made of land zoned as one of the three districts. Among other permitted uses were these: hiking trails and campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing, and electrical substations. Additionally, outdoor recreation concessions and educational facilities were permitted in the Recreation District.

Appellants claim that these restrictions deprive them of "all beneficial use or development" of their land and they request injunctive, declaratory, and monetary relief. Their claims are based on the Fifth and Fourteenth Amendments to the Constitution and on the just compensation provisions of the respective state constitutions.

## II.

## DETERMINING THE PROPER CAUSE OF ACTION

(a) *The Compact as Federal Law.*

Before we can determine whether appellants' complaints will withstand a Fed.R.Civ.Pro. 12(b)(6) motion, we must determine under what law and what theories appellants can proceed to trial. The complaints are filled with a variety of constitutional references, state and federal, and allege actions of inverse condemnation and, more generally, of "taking."

Although the Compact is in essence a bi-state contract,[9] this circuit had held that congressional consent transforms the Compact into a law of the United States. *League to Save*

8. *Id.* section 7.110.

9. See discussion of Frankfurter, J., dissenting in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 283-89, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).



*Lake Tahoe v. TRPA*, 507 F.2d 517, 519 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).[10] Because the Compact is a federal law, the agency

Because it is the action of the TRPA which is the basis of these cases and because the TRPA acted under powers given it by the terms of the Compact, we are of the opinion that no cause of action has been stated under any *state* laws. Those causes of action grounded on the just compensation provisions of the California and Nevada state constitutions functioning under its terms is operating under federal law, although it is not necessarily a federal agency.[11]

10. In so doing the court chose between the two principal species of legislation: federal and state. As will be developed *infra*, this characterization is not without its difficulties. At least one commentator has suggested that it may be more fruitful to recognize compacts as a third and distinct species: interstate legislation. This would

> "permit, although not require, the inference that interstate agencies created by compact are subdivisions of neither the state nor the federal government, but are political entities *sui generis*, exercising a limited sovereignty distinct from that of the states which have delegated power to them, and from the United States."

Engdahl, "Construction of Interstate Compacts: A Questionable Federal Question", 51 Va.L.Rev. 987, 1040 (1965).

11. As the California United States District judge below noted, there is insufficient federal control or involvement to hold the United States responsible for TRPA's actions. Additionally, the Compact itself provided that TRPA was to be a separate legal entity. Compact, Art. III(a). More than this, however, special consideration should be given to the unique nature of interstate compacts. As noted in Leach R. & Sugg, Jr. R., *The Administration of Interstate Compacts* 22 (1959):

> "Agencies established by interstate compact are identified administratively with the party states rather than with the federal government. They may develop close relations with federal departments . . . but they are no more a part of the federal administrative organization than any ordinary department of a state government. The use of compacts is still too new, however, for any well-defined concept of the proper relations between a state and a compact agency to which it subscribes to have developed."

were therefore properly dismissed for failure to state a claim upon which relief can be granted.

(b) *Actions Under the United States Constitution.*

The complaints also mentioned the due process clause of the Fourteenth Amendment which safeguards personal rights against arbitrary and oppressive state action. Thus, if the TRPA's enactment of the LUO was such an over-zealous use of its police powers as to amount to a taking of appellants' property, it might, in the proper circumstances, fall under the due process clause of the Fourteenth Amendment.

This amendment applies also to acts of political subdivisions of the state. *Lowe v. Manhattan Beach City School District,* 222 F.2d 258 (9th Cir. 1955) (school district); *Miller v. County of Los Angeles,* 341 F.2d 964 (9th Cir. 1965) (county). Whether a cause of action under the Fourteenth Amendment can be stated against the TRPA would turn on whether it is an agent or political subdivision of the state.

Because of the complex nature of the Compact and the difficulties inherent in categorizing those operating under it, the district courts did not decide whether the agency was an arm of the state. We also do not find it necessary to decide this issue. It is not relevant in deciding whether a cause of action is stated against the states because, as discussed hereafter, the states were properly dismissed as defendants because they did not waive their Eleventh Amendment immaturity from suit.

The due process clauses of the Fifth and Fourteenth Amendments are sufficiently similar for analytical purposes so that if a cause of action were stated under the Fifth Amendment, a claim under the Fourteenth would also be stated, if there were a proper defendant against whom to



state it. A separate discussion of a possible Fourteenth Amendment claim is therefore not necessary for purposes of due process analysis. Thus we need not further refine the characterization of the TRPA.

We now consider the possibility of a claim under the Fifth Amendment to the Constitution. For our purposes there are two relevant clauses: the due process and the just compensation (condemnation) clauses. It is our opinion that the two, although relying on substantially the same evidence when a suit based on either is brought in the context of this factual situation, provide the bases for two separate possible causes of action.

We find that a cause of action for inverse condemnation cannot be stated against the TRPA because it lacks condemnation authority.[12] We do not find, however, that this requires dismissal of appellants causes of action. The same facts alleged by appellants do form the basis for a claim of denial of due process under the Fifth Amendment for an improper "taking" of their land. This court has stated:

> The due process clause, in its procedural as opposed to its substantive aspect, guarantees plaintiffs that their liberty and property interests will not be invaded by the government except insofar as they are given an opportunity to challenge the purported justification (legal, factual, or both) of the invasion. Thus, to make out a prima facie claim that they have been denied due

12. TRPA was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. *Western Union Tel. Co. v. Penn. R.R.,* 195 U.S. 540, 569, 25 S.Ct. 133, 49 L.Ed. 312 (1904). *See also Hudson Water Co. v. McCarter,* 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm'n,* 206 U.S. 1, 20, 27 S.Ct. 585, 51 L.Ed. 933 (1906). The delegation of police power to TRPA was neither an express grant of condemnation power nor one by implication.

process, plaintiffs must establish two elements: (1) that their liberty or property interests have been invaded by the government without an opportunity to challenge that invasion, and (2) that the purported justification for the invasion is at least plausibly disputable (otherwise an opportunity to challenge that justification would be an empty formality).

*Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.*, 506 F.2d 467, 469 (9th Cir. 1974).

Perhaps an argument could be made that, because the TRPA is not a federal agency, it is not "the government" and therefore the Fifth Amendment is inapplicable, just as the Fourteenth Amendment is inapplicable if the TRPA is not a state agency. This reasoning, however, could lead to the untenable conclusion that the TRPA is immune from suit because of its somewhat unique status: part state and part federal but not entirely either.

We conclude that the fact that the Compact is a federal law is sufficient to bring the TRPA within the reach of the Fifth Amendment. As the Supreme Court has stated:

> Due process of law in [the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.

*Hurtado v. California*, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884). The Compact has been held to be a "law of the land" and was made such by means of powers delegated to Congress in Art. I, section 10, cl. 3 of the constitution.



Were this not enough, federal courts could call upon their inherent "judicial inventiveness"[13] to meet this new situation. The "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." 110 U.S. at 530, 4 S.Ct. at 118. Federal common law doctrines[14] are not frozen in form and reach, and courts must "take account of the evolution of common law principles in the light of current perceptions and needs." *United States v. Schoefield*, 150 U.S.App.D.C. 380, 465 F.2d 560, 561, *cert. denied*, 409 U.S. 881, 93 S.Ct. 210, 34 L.Ed.2d 136 (1972). The due process clause was intended to protect the individual from arbitrary exercise of the powers of the government. This common-sense principle will not be circumvented by forms and procedures, unknown to our ancestors in England and therefore for which there is no age-old basis in the common law tradition.

## III.
## DETERMINING WHETHER A CLAIM HAS BEEN STATED

Having decided that appellants can state a claim under the Fifth Amendment due process clause, the next inquiry is whether they have, in fact, done so. We first determine what standard of review applies.

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13. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 465, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957) (Frankfurter, J. dissenting).

14. Clearly there is a "federal common law" even if not a "federal general common law." See Wright, *Federal Courts*, § 60 at 214 (1963) (discussing Justice Brandeis' same-day statements in Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938) and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S. Ct. 803, 82 L.Ed. 1202 (1938). Federal common law binds the states through the supremacy clause and is a law of first resort, subject to revisions by subsequent legislation. See Note, 82 Harv.L. Rev. 1512 (1969); Monaghan, "Foreword: Constitutional Common Law," 89 Harv.L.Rev. 1 (1975).

In the *Jacobson* case, the district judge noted that the complaint challenged the constitutionality of an administrative enactment. Relying on *Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 (1935), he held that the acts of an administrative body are entitled to the same presumption of constitutionality accorded legislative acts and that a stricter standard of pleading was therefore applicable when judging a motion to dismiss. *See* 387 F.Supp. at 436—38.

> The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth.

296 U.S. at 185, 56 S.Ct. [159], at 163, *quoted* in 387 F.Supp. at 437.

Under this standard of pleading, none of the complaints in any of the four consolidated cases on appeal would withstand a motion to dismiss because they lack specific factual allegations which, if proved, would rebut the presumption of constitutionality. Although *Pacific States* has never been explicitly overruled, we do not believe that it states the present law applicable to a motion to dismiss for failure to state a claim. *Pacific States* was decided two years before the promulgation of the Federal Rules of Civil Procedure and we find no precedent in this circuit for its application in this context since that time.

In *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court explained the modern philosophy concerning pleadings:

> . . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require



> is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

355 U.S. at 47—48, 78 S.Ct. at 103.

Under the federal rules, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A *Moore's Federal Practice* ¶ 12.08 (1975). Pleadings are to be liberally construed.

Under this standard of pleading, which we apply in this case, both district judges found the complaints to be adequate to withstand the 12(b)(6) motion.[15] We agree. The allegations of taking, even though phrased in terms of inverse condemnation, do evidence that appellants complained that the police powers of the TRPA were improperly exercised and that they relied on the Fifth Amendment.

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15. The California judge was clear on this point. The Nevada judge was less emphatic, stating: "It would appear, nevertheless, that these essentially conclusory complaints might withstand a motion to dismiss in the usual case." 387 F.Supp. at 436. He went on to apply the *Pacific States* standard. *Id.* at 437. We take his language to imply, however, that he would have found the complaints adequate in the usual case.

We therefore reverse the district courts' rulings on this point. Although appellants may wish to amend their complaints on remand to the district court in light of our opinion, we do believe that their complaints are sufficient under the federal rules to state a claim upon which relief may be granted.[16]

## IV.

## DISMISSAL OF THE DEFENDANTS

Appellants also appeal from the district courts' dismissals of all party defendants except the TRPA. Among those dismissed were counties in the Lake Tahoe area, the states of California and Nevada, the United States and the individual members of the governing body of the TRPA at the time the LUO was enacted. We shall discuss them individually.

(a) *The Counties.*

Fed.R.Civ.Pro. 20(a) allows joinder of parties as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief arising out of the same occurrences and if any question of law or fact common to all defendants will arise in the action. Appellants joined the counties because they have enforcement authority of the

16. We anticipate that such amendments might take the form of omitting the inappropriate state claims, among other matters. Additionally, borrowing again from the condemnation literature, we note that mere diminution of value will not suffice to establish a "taking." *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); *HFH Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). Clearly, however, a taking can occur even when land is not physically appropriated by another. 2 *Nichols' The Law on Eminent Domain* § 6.3 (1976).



Tahoe Regional General Plan under Art. V(c) of the Compact (along with the TRPA, the states and the cities).

Appellants' cause of action arises from the enactment of the LUO. They seek monetary damages and a declaration of their rights under the ordinance. There is no reason to believe that the counties would attempt to enforce the LUO were it declared invalid by a court of law. Indeed, the counties appear favorable to appellants' development plans.

Furthermore, the TRPA is not an agent of the counties which have no financial liability for any monetary damages that might be assessed. Their financial obligations are fixed by provisions of the Compact.

Appellants can obtain complete relief without joining the counties in their suits. The counties were therefore properly dismissed.

(b) *The States.*

California and Nevada were also joined as defendants, either on the theory that the TRPA was a political subdivision of the states, or alternatively that the zoning was a joint undertaking by the states and the TRPA. The district judges did not decide these issues, holding instead that any adjudication of condemnation would mean that the TRPA had exceeded the authority delegated to it and thus its actions would not be regarded as those of the states. *See* 387 F.Supp. at 439.

We decide on another ground that the states are not proper parties.[17] The issue of the Eleventh Amendment as

17. This court may affirm on any ground squarely presented on the record. *Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); *M.O.S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967).

a bar[18] to suing the states was raised by at least one party below. Even had it not been raised, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it would be proper to consider it for the first time on this appeal. See *Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

The Eleventh Amendment has been held to immunize a state from suits brought in federal court for money claims payable from a state treasury by the state's own citizens as well as by citizens of a foreign state. *Edelman,* 415 U.S. at 663, 94 S.Ct. 1347. Although this is an immunity which the state may waive at its pleasure, the conclusion that there has been a waiver of immunity from suit will not be lightly inferred. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

Relying on *Petty,* appellants allege that California and Nevada waived their immunity to suit by enacting the Compact. In *Petty,* Congress approved a compact between Tennessee and Missouri containing a clause giving the Commission the right "to contract, and to sue and be sued." In some respects this language is similar to that in Art.

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18. The Eleventh Amendment provides:
"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens, or Subjects of any Foreign State."

For a fuller discussion of express and implied waiver of Eleventh Amendment immunity *see* Comment, *"Edelman and Scheuer:* The Relationship Between the Eleventh Amendment and Executive Immunity," 58 Marq.L.Rev. 741 (1975).



VI(b) and VI(e) of the Tahoe Compact allowing the TRPA to bring suit and be a party in actions brought in state and federal courts of the state where the violation of the general plan occurred or where the property was affected.

The difference between *Petty* and this case is that in *Petty,* Congress, in approving the compact, attached a proviso that its approval should not be construed as affecting, impairing, or diminishing federal court jurisdiction over matters arising under the compact. No similar proviso was attached when Congress approved the Tahoe Compact. The added proviso became critical when the Supreme Court determined that Tennessee and Missouri had waived their immunity to suit. The Court stated:

> The States who are parties to the compact by accepting it and acting under it *assume the conditions that Congress under the Constitution attached.* So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates *when the condition attached by Congress is accepted and acted upon by the two States.*

359 U.S. at 281-82, 79 S.Ct. at 790 (emphasis added and footnote omitted).

Discussing *Petty* and *Edelman* the Court emphasized the presence of congressional intent, stating:

> The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of the immunity.

415 U.S. at 672, 94 S.Ct. at 1360.[19] Appellants have indicated no language attached by Congress in approving the Compact, nor have we found any, which indicates that Congress intended to abrogate the immunity of the states. Any waiver must therefore be found in the language of the Compact itself.

In oral argument, counsel referred us to Article VI(b) of the Compact as indicative of a waiver of immunity. This provision provides in part that the TRPA will be deemed a political subdivision of both states for purposes of suit. When read in conjunction with Art. III(a) of the Compact, indicating that the TRPA was to be a separate legal entity, however, it appears that Art. VI(b) was intended to operate as a grant of state court jurisdiction over the TRPA. The provision is admittedly not without ambiguity. The question of waiver is one of federal law, however, 359 U.S. at 279, 79 S.Ct. 785. The existence of waiver is not to be lightly inferred. Therefore, in the light of a lack of an express waiver of suit by the contracting states, we will not imply it here.

(c) *The United States.*

J. BLAINE ANDERSON, Circuit Judge:

The United States was named as a party defendant in No. 76-1608 (*Layton-Tahoe v. TRPA*). That case was originally instituted in the California Superior Court and was removed to the United States District Court on motion of the government. The district court dismissed the United States from the action, finding that the TRPA was not an agency of the government and that there was no "authority which permits the federal defendants to be sued."

The involvement of the United States with the Compact

19. See also *League to Save Lake Tahoe v. TRPA et al.*, 507 F.2d 523, n.13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).



is limited to two different aspects. First, in 1969, Congress, by enacting Public Law 91-148, gave its approval and consent to the Compact entered into by California and Nevada. Second, the government's present involvement in the Compact is found in Article VIII, Section 3 of the Compact, which allows the President of the United States to appoint a non-voting representative to the governing body. We agree with the district court that the approval of the Compact by Congress did not thereby establish TRPA as an agency of the United States and also that the government's limited present involvement with the Compact is insufficient to hold the United States responsible for TRPA's actions.

Moreover, there is no language in the Compact indicating that Congress gave its consent to allow the United States to be sued. The United States cannot be sued without its consent. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). It rests with Congress to determine whether the United States may be sued, and, if so, in what court. *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939). Congress, in enacting the Tucker Act (see 28 U.S.C. §§ 1346 and 1491), which waived sovereign immunity for certain claims, provided for jurisdiction in the federal district court or the United States Court of Claims, but it did not subject the United States to suit in a state court. This suit was begun in a state court and if that state court lacked jurisdiction, the federal court acquired none upon removal, *Minnesota v. United States, supra*, even where the federal court would have had jurisdiction had the suit been commenced in federal court. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922).

The district court properly dismissed the United States

from this action as it was without jurisdiction over the United States where the United States did not give its consent to be sued.

(d) *Individual Members of the TRPA Governing Board.*

The individual members of TRPA's Governing Board and its Executive Director were named as party defendants in No. 76-1289 (*Lake Country Estates, Inc. v. TRPA*). These individuals are named in appellant's Seventh and Eighth Causes of Action, which allege that they, as members of TRPA's Governing Board, violated appellant's constitutional rights by enacting and implementing the General Plan and Land Use Ordinance, thereby taking appellant's property without due process of law and without just compensation. The district court dismissed the complaint as to these individual defendants,[20] holding that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." (C.T. 186)

Before addressing the immunity issue, we must examine the jurisdictional basis of this action against these individual defendants. Appellant alleged jurisdiction under two statutes, 28 U.S.C. § 1331 and § 1343 (1970). Section 1343 is the jurisdictional statute for civil rights actions arising under 42 U.S.C. § 1983 (1970). In order to establish a claim cognizable under § 1983, appellant must show that he has been deprived of a right secured by the Constitution and that such deprivation was achieved under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The acts complained of here arise solely out of the actions taken by these individuals in their capacity as members of TRPA's Governing Board and as the Executive Director of TRPA. Any action cognizable under § 1983 necessarily depends upon the source of powers given to these individuals as members of TRPA. This court, in *League to Save Lake Tahoe v. TRPA, supra,* held that the Compact is a matter of federal law. Because the Compact giving rise to TRPA is a matter of federal law, the jurisdictional requisite of state action is missing and no action can be stated under § 1983 against these individual members of TRPA.

Appellant also relied upon the federal question jurisdiction statute. 28 U.S.C. § 1331 (1970). This statute was used in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in which the Court fashioned a federal cause of action for damages against federal officers for a violation of the Fourth Amendment. The Court implied a damages remedy directly from the Constitution and viewed it as an unsurprising and historically-indicated remedy:

> [I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

403 U.S. at 395-96, 91 S.Ct. at 2004, *quoting* from *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (footnote omitted).

In *Bivens* it did not matter whether the availability of money damages was necessary to enforce the Fourth Amendment or whether there was prior congressional authorization for such a remedy. Instead, the Court framed the question as whether petitioner was "entitled to redress his injury through a particular remedial mechanism nor-

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20. Defendants Doug Leisz and Jack W. Deinema were voluntarily dismissed without prejudice on January 4, 1974. C.T. 236-37.

mally available in the federal courts. *Cf. J. I. Case Co. v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)." 403 U.S. at 397, 91 S.Ct. at 2005.[21]

Appellant's claim is based on the Fifth, not the Fourth Amendment. We must therefore determine whether the rationale of *Bivens* can be extended to cover constitutional rights other than those based on the Fourth Amendment.

The Court's reasoning in *Bivens* is applicable to rights protected by other than the Fourth Amendment. Although the question whether to limit the applicability of *Bivens* has apparently not been decided by this circuit[22] and district courts deciding the question have differed in their dispositions, most courts of appeals have held that the remedy is not limited to Fourth Amendment violations alone.[23] We believe that this is the better reasoned view. Nothing in the

21. Justice Harlan's approach in his concurring opinion emphasized the availability of equitable remedies to redeem constitutional rights. This is a more helpful approach than that of the majority. *See* Note, 33 U.Pitt.L.Rev. 271 (1971). Equitable remedies can be employed against officials acting outside the scope of their constitutional authority.

22. In *Mark v. Groff,* 521 F.2d 1376, 1378 n. 1 (9th Cir. 1975), the court noted that the question of a damages claim was not raised and the court chose to take no position.

23. The following cases have been favorable to extending or have extended the applicability of *Bivens*:
*Davis v. Passman,* 544 F.2d 865 (5th Cir. 1977) (extending *Bivens* to cover Fifth Amendment due process); *Rodriguez v. Ritchey,* 539 F.2d 394 (5th Cir. 1976) (extending to cover investigatory officers who did not participate in the actual arrest); *White v. Boyle,* 538 F.2d 1077 (4th Cir. 1976) (retaliatory IRS investigation could give rise to a *Bivens* action); *Paton v. La Prade,* 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *Dry Creek Lodge Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975) (favorable dictum); *States Marine Line, Inc. v. Schultz,* 498 F.2d 1146 (4th Cir. 1974) (customs officers liable for improper performance of duties—Fifth Amendment due process); *United States ex rel. Moore v. Koelzer,* 457 F.2d 892 (3rd Cir. 1972) (extended to Fifth Amendment rights to a fair trial); *Butler v. United States,* 365 F.Supp. 1035 (D.Hawaii 1973) (First Amendment); *Washington v. Brantley,* 352 F.Supp. 559 (M.D.Fla.1972) (favorable dictum).
The following district courts have limited *Bivens* to Fourth Amendment cases: *Smothers v. Columbia Broadcasting System,* 351 F.Supp. 622, 626 n. 4 (C.D.Cal.1972); *Davidson v. Kane,* 337 F.Supp. 922 (E.D.Va.1972).
The Second Circuit has considered the question to be open. *Wahba v. New York University,* 492 F.2d 96 (2nd Cir.), *cert. denied,* 419 U.S. 874, 96 S.Ct. 135, 42 L.Ed.2d 113 (1974). *But see Brault v. Town of Milton,* 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds,* 527 F.2d 736 (2nd Cir. 1975) (Fourteenth Amendment due process violation "comes within *Bivens'* sweeping approbation of constitutionally-based causes of action."). The First Circuit has recently found no need to reach the question (in a Fourteenth Amendment context), thus leaving the possibility of extending *Bivens* in that circuit. *Comtronics, Inc. v. Puerto Rico Tele. Co.,* 553 F.2d 701 (1st Cir. 1977).



language of *Bivens* or its rationale warrants a limitation solely to Fourth Amendment claims.

The rights protected by the Fifth Amendment due process clause are as fundamental as Fourth Amendment rights. The similarities between the due process clause and the just compensation clause (for which a monetary remedy *is* provided) in the context of this case lends support to the appropriateness of recognition of this claim under the *Bivens* constitutional tort doctrine. By its allegation of jurisdiction under § 1331 it is clear that in addition to its § 1983 claim, the appellant is pursuing a separate claim which derives directly from the Constitution. Jurisdiction was properly asserted under 28 U.S.C. § 1331 (1970).

Turning now to the immunity issue, we note at the outset that the only difference between a § 1983 claim and a *Bivens* claim is that, where the constitutional infringer has acted under color of state law, § 1983 is applicable and where the constitutional infringer acts under color of federal law, a *Bivens* action can lie. Appropriately,. courts

have, for the most part, applied § 1983 law to *Bivens*-type actions. *See, e.g., Brubaker v. King,* 505 F.2d 534 (7th Cir. 1974). This court, in *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975), stated:

> Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in § 1983 suits.

(Citations omitted.) 521 F.2d at 1380. We also will resort to § 1983 law to determine the applicability and extent of the immunity doctrine as it relates to the individual governing members of TRPA.

Our first task is to determine the type of functions undertaken by these individuals because that classification will control the type and extent of immunity accorded these individuals. Courts in dealing with the immunity doctrine have established three general classifications: judicial, *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); executive, *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); and legislative, *Tenney v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). We must determine which, if any, of the classifications apply to these individual appellees. To begin this analysis we examine the powers accorded them under the Compact.

The Tahoe Regional Planning Compact was enacted "[i]n order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, . . ." [24] It was desired "that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and

24. Pub.L. 91-148, 83 Stat. 360 (statement of purpose).



orderly development, . . ."[25] The Compact created the Tahoe Regional Planning Agency as "a separate legal entity" and provided that its members shall be appointed by the various counties and cities in the area and from each state. To effectuate its purposes, the Compact mandated that "[w]ithin 90 days after the formation of the agency, the governing body shall adopt a regional interim plan" and also that "[w]ithin 18 months after the formation of the agency, the governing body shall adopt a regional plan."[26]

The powers given to the agency and its governing body are found in Article VI of the Compact. Section (a) thereof states, "The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans." Section (b) states "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency . . ." Section (e) states, "The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules, regulations and policies." Additionally, the agency was given enforcement power over the provisions of the interim plan and the regional general plan. *See* Compact, Art. V(e) and (f).

The above review of the agency's powers demonstrates that the agency possess legislative powers (adoption of ordinances, etc.) and executive powers (enforcement powers). The immunity afforded to those acting in these different capacities under § 1983 law is also different.[27] Absolute immunity is given to legislators for actions performed in their legislative function. *Tenney v. Grandhove, supra; Doe v. McMillan,* 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d

25. Compact, Art. I(e).

26. Compact, Art. V(b) & (d).

27. *E. g., Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976).

912 (1973). Executive officers, on the other hand, are given a qualified immunity for their actions dependent on "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time" in question. *Scheuer v. Rhodes,* 416 U.S. at 247, 94 S.Ct. at 1692; *see also Navarette v. Procunier,* 536 F.2d 277 (9th Cir. 1976); *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975).

The problem in the present case is that we cannot tell from the state of this record whether the acts complained of arise by virtue of the individuals' legislative powers or their executive powers. From our reading of appellant's complaint it appears that the principal basis of appellant's cause of action arises by virtue of the governing body's enactment of the Land Use Ordinance; however, that enactment also carries with it the power to enforce the ordinance. Accordingly, we believe that it is proper to remand to the district court for further factual development as to the exact nature of the complained of actions.

We will offer some guidelines for the district court on remand. We believe that the individuals should be given absolute immunity as in § 1983 actions for any actions taken in their legislative function. We are aware that absolute immunity has only been given to state and national legislators under § 1983 law. *Doe v. McMillan, supra.* We also note that the question of immunity to be afforded to members of an interstate compact has never been squarely addressed. We believe that the nature of these compacts, in effect, establishes a "regional legislature." In an area such as Lake Tahoe the legislature of either state cannot effectively deal with problems that transcend state boundaries. Neither can Congress adequately deal with these regional problems because they require treatment by a body which will take into account regional interests, regional pride, and regional wis-



dom. As two authors have noted in writing about interstate compacts:

> Legislation is the answer and legislation must be coterminous with the region requiring control. . . . The regions are less than the nation and are greater than any one state. The mechanism of legislation must therefore be greater than that at the disposal of a single state.[28]

We see no reason not to accord these "regional legislators" the same immunity accorded their state and national counterparts.

We also believe that these individuals should be given the same qualified immunity espoused in *Scheuer v. Rhodes, supra,* for acts in their executive capacities. The problem in this case is compounded because these "regional legislators" are empowered with enforcement powers over their own legislation. If the only complaint, as it relates to their executive function, is the formal enforcement of the ordinances they enacted, qualified immunity would absolve these individuals from liability. Stated another way, the appellant must show something more than an evenhanded enforcement of the ordinance with which it disagrees.

Appellant also seeks declaratory and injunctive relief against the individual members seeking to require them to repeal the existing ordinances and to enact new ordinances permitting the proposed development. The immunity afforded governmental officers for damage suits does not defeat a claim for equitable relief, *Safeguard Mutual Insurance Co. v. Miller,* 472 F.2d 732 (3rd Cir. 1973), but the type of relief requested would put the court directly in a legislative role, a situation to be avoided. *New Orleans Waterworks Company v. New Orleans,* 164 U.S. 471, 482, 17

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28. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685 (1925).

S.Ct. 161, 41 L.Ed. 518 (1896); *Real Estate Development Company v. City of Florence,* 327 F.Supp. 513 (E.D.Ky. 1971). Moreover, as previously noted, the agency remains a defendant. This provides appellant an opportunity to obtain complete relief by seeking an adjudication that the land use ordinance is invalid so that appellant may proceed with its development.

## V.
## SEPARATE ISSUES

(a) *Jacobson v. TRPA,* No. 75—2400.

EUGENE A. WRIGHT, Circuit Judge:

Several remaining issues are pertinent only to one or two of the cases on appeal. The first is whether appellant Jacobson lacks standing to sue.

*Data Processing v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), set forth two requirements for standing: (1) the action challenged must have caused the plaintiff injury in fact; and (2) the interest sought to be protected must arguably be within the zone of interests protected. Additionally, as this court recognized in *Bowker v. Morton,* 541 F.2d 1347, 1349 (9th Cir. 1976), the recent Supreme Court cases of *Simon v. Eastern Kentucky Welfare Rights* Organization, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed. 450 (1976), and *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), indicate that a plaintiff must allege facts from which it can reasonably be inferred that this injury resulted in a "concretely demonstrable way" from defendant's action *and* that a grant by the court of the relief sought will remedy the wrong plaintiff suffers.

Whether Jacobson meets these tests depends on what interest has Jacobson on which he bases his suit and on our determination of what remedies are available to him.

Jacobson was the sole stockholder of the general partner in the limited partnership of Kings Castle Limited Partnership (KCLP). He was a limited partner in KCLP as well. KCLP owned property in the Lake Tahoe area when the LUO was enacted. Subsequent to the enactment of the ordinance, KCLP went bankrupt. During the bankruptcy proceedings it assigned its property interest to another entity. Jacobson, however, alleges that he "retained"[29] his present cause of action against the TRPA. He therefore brought suit for an improper taking of his interest in the land.



In his first complaint he requested declaratory and monetary relief. The district judge dismissed his cause of action for failure to state a claim upon which relief could be granted. The court held the monetary relief was unobtainable because the TRPA lacked the power to condemn. The possibility of declaratory or injunctive relief was left open, however.

Jacobson then amended his complaint to request declaratory and injunctive relief. This action was also dismissed, the district judge properly determining that Jacobson had no standing to request injunctive or declaratory relief because only a present owner of land has standing to attempt to set aside the zoning of his land. The judge indicated, how-

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29. We give Jacobson the benefit of the doubt as to what he meant by alleging that he "retained" his present cause of action. This is a matter for clarification upon remand to the district court.

It is well settled that the right to recover compensation from condemnation of property remains in the one who owned the property at the time of taking, regardless of whether the property is subsequently transferred to another. 2 Nichols' *The Law on Eminent Domain* § 5.1[4] (1976).

Using this as an analogy, the question would be whether Jacobson received whatever right to compensation KCLP originally had at the time of the alleged taking. If KCLP had a right which, similar to the right to a condemnation award, was assignable (*See Nichols, supra* § 5.21[3]) it is conceivable that it was assigned to Jacobson. Because the record before us is insufficient to make this determination, we leave this to the district court to which Jacobson may present additional documentation upon remand.

ever, that if the monetary relief issue were decided differently on appeal, the outcome as to the issue of Jacobson's standing would be different.

Assuming, without deciding, that Jacobson did "retain" a sufficient interest to allow him to proceed with his suit, the issue is whether monetary damages are recoverable. We agree with the district judge that the TRPA lacks the power to condemn, without which there can be no compensation for an inverse condemnation under the Fifth Amendment just compensation clause.[30]

Although not entitled to any share of a condemnation award, the question remains whether Jacobson might be entitled to some reduced amount for lost profits or other compensable harm. Although not raised in the district court, the theory behind such a claim would be predicated on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). As previously noted in this opinion, we believe that that rationale of *Bivens* can be extended to cover a Fifth Amendment due process claim such as Jacobson's. This is true even though the action is stated against the TRPA rather than its governing members.

The case for implying a damages remedy is even more compelling in Jacobson's case because there is no meaningful alternative remedy. He has no standing to seek injunctive relief.

Therefore we vacate the district judge's dismissal of Jacobson's complaint and remand for a determination whether, in fact, Jacobson has retained a cause of action upon which his suit can be based and for further proceedings in light of this opinion.

(b) *Jones, et al. v. TRPA,* No. 76—1182.

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30. *See* n. 12 *supra.*



Appellee argues that dismissal of Jones' case is appropriate for failure to establish federal jurisdiction. Such jurisdiction is appropriate only where a substantial federal question appears from a properly pleaded claim. 2 *Moore's Federal Practice* ¶ 2.07[2]. In paragraph one of their complaint, appellants state that jurisdiction is invoked on the same grounds as that invoked by the TRPA in its removal of "a comparable action to the United States District Court for the District of Nevada, Reno . . ." [Clerk's Transcript at 1.] We disapprove of this formulation. The court, from a reading of the complaint, is unable to determine from the pleading the basis for jurisdiction.

It is also necessary for a case to be within the purview of 28 U.S.C. § 1331(a) that a right or immunity created by the Constitution or federal laws be an essential element of plaintiffs' claim. As stated by the Supreme Court in *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936):

> [A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.
> (Citations omitted.)

Appellants' complaint said that the nature of their claims is such that they are under the laws and Constitution of the United States and specifically the Tahoe Regional Planning Compact. They alleged no violations of specific federal Constitutional provisions.

This is not a case where the construction of the Compact provides the needed federal question. *Compare League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974),

*cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975). The question raised was whether the regulation went too far, *not* whether the TRPA, under the terms of the Compact, had the *power* to regulate.

When the constitutional underpinnings of a claim are not presented in the complaint, the general allegation of jurisdiction is not borne out by a well-pleaded claim. 2A *Moore's Federal Practice* ¶ 8.09[1].[31]

We do not hold that appellants should be denied leave to amend. Fed.R.Civ.Pro. 15 provides for leave to amend once as a matter of right when no responsive pleading has been filed, and otherwise by leave of court when justice so requires. The spirit of the federal rules is that cases should be decided on their merits. Appellants have not acted in bad faith in presenting an inadequate complaint. Therefore, although we do hold that appellants' complaint should be dismissed, the district court should do so with leave to amend.

(c) *Layton-Tahoe Properties v. TRPA, No. 76-1608 and Lake Country Estates, Inc. v. TRPA, No. 76-1289.*

GOODWIN, Circuit Judge:

In *Layton-Tahoe* and *Lake Country Estates* plaintiffs sought injunctive relief in addition to damages, declarative relief, and mandamus. These requests for injunctive relief require additional consideration by this court.[32]

The district court was of the opinion that plaintiffs had stated a claim for inverse condemnation, but dismissed their actions on the sole ground that an action for damages would

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31. The mere fact that a party derives its power under a compact approved by Congress does not provide federal jurisdiction. *Delaware River Joint Toll Bridge Commission v. Stults*, 146 F.Supp. 241 (D.N.J.1956).

32. Jacobson, appellant in No. 75-2400, also requested injunctive relief in his amended complaint but because he has no standing to request such relief (see discussion in Part V a *supra*) we do not discuss his case here.



not lie against a defendant agency that did not have the power of eminent domain.

The court also stated in dicta that, if plaintiffs could establish that TRPA's ordinance constituted a taking of their properties, the ordinance would be treated as action beyond TRPA's authority and held invalid.

Whether plaintiff's property has been diminished in value to such an extent as to constitute a taking is a question of fact to be decided by the trial court and cannot be disposed of on a motion to dismiss on the sole ground that an action for damages does not lie against the defendant.

Even if an agency which has no power to condemn property, and no budget with which to pay for property it may attempt to take, cannot be levied upon in execution of a money judgment for damages, the landowner is not helpless. Although the agency relies upon its empty exchequer to assert that it cannot be held for damages, the agency may yet be subject to an injunction to keep it from doing indirectly that which it cannot do directly. *See Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976). It will be for the district court to decide, upon all the facts to be developed at trial, whether or not the agency action constitutes a de facto taking without due process.

An additional problem is created by the unique manner in which Layton-Tahoe's property was rezoned by the TRPA. Appellant's 85 acres of land had been zoned for 240 home sites prior to the adoption of the LUO. The ordinance resulted in 20 of the 85 acres being designated as "Low Density Residential," allowing for a total of 80 home sites. The other 65 acres were rezoned as "General Forest." Thus a unitary piece of property was rezoned in two distinct segments.

Layton-Tahoe claims a $500,000 loss in value as a direct result of the General Forest designation. TRPA answers that it has the power to downzone plaintiff's property from 240 residential lots to 80. Plaintiff concedes that mere downzoning of property is not compensable. *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). Loss in value alone is insufficient to establish an unconstitutional taking of private property. *Steel Hill Development v. Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972). When a governmental regulation causes a loss in value of sufficient magnitude, however, the courts recognize the destruction of value as a taking and require compensation.

> • • • We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change • • •

*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

Whether Layton-Tahoe's property should be treated as a single unit as TRPA contends, or as two separate rezoned segments, is an issue most appropriately passed on initially by the district court. The point at which a taking occurs is a question properly turning upon the particular circumstances of each case. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958). Upon remand, the district court will have the opportunity to develop facts sufficient to make an appropriate determination.

## VI.

## CONCLUSION

EUGENE A. WRIGHT, Circuit Judge:

The dismissal of cause No. 75-2400 is vacated and remanded for consideration of whether Jacobson retained any



cause of action upon which suit can be based. If a cause of action has been retained, any further proceedings will depend on the submission of a proper amended complaint which does not request injunctive relief and does not join as parties defendant those parties found to have been properly dismissed. *See* Part IV. *supra.*

The dismissal of cause No. 76-1182 was proper although for reasons different from those given by the district court. We have held that the complaint failed to establish the basis for federal jurisdiction. We will, however, vacate the dismissal, which made no provision for leave to amend, and remand the cause for entry of an order of dismissal for failure to establish federal jurisdiction with leave to amend. Any future complaint should, of course, conform to the directives expressed in this opinion.

The dismissals of causes Nos. 76-1608 & 76-1289 are affirmed in part and reversed in part. The court's dismissal of all claims based on the just compensation provisions of the California and Nevada state constitutions and the federal Constitution are affirmed. Similarly the dismissal of the counties, states, and United States as parties-defendant was proper.

Appellants did state a cause of action for an improper taking of their property under the Fifth Amendment due process clause, however. We therefore reverse the court's dismissal of appellants' complaints for failure to state any claim upon which relief can be granted and the cases are remanded for further consideration of appellants' claims for relief, consistent with this opinion.

These four cases are vacated in part, affirmed in part, reversed in part, and remanded for further consideration.

## *Appendix D*

### District Court's Combined Opinion

Civil S-2799

LAKE COUNTRY ESTATES, INC., et al.,
*Plaintiffs,*

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
*Defendants.*

Civil S-2894

GLENRIDGE PARK CO., et al.,
*Plaintiffs,*

v.

STATE OF CALIFORNIA, et al.,
*Defendants.*

Civil S-2915

MELVIN F. JONES, et al.,
*Plaintiffs,*

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
*Defendants.*

Civil S-2922

GLENRIDGE PARK CO., et al.,
*Plaintiffs,*

v.

STATE OF CALIFORNIA, et al.,
*Defendants.*



Civil S-2944

LAKE TAHOE GOLD MINING CO.
*Plaintiff,*

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
*Defendants.*

Civil S-74-545

NINA PODMORE,
*Plaintiff,*

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
*Defendants.*

Civil No. S-74-547

LAYTON TAHOE PROPERTIES,
*Plaintiff,*

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
*Defendants.*

COMBINED OPINION

In view of the similarity of issues, the above cases will be consolidated for the purposes of this opinion only.

Presently pending are numerous motions to dismiss.

TRPA'S MOTION TO DISMISS.

While the complaints state facts sufficient for a cause of action in inverse condemnation, it is this Court's belief that an inverse condemnation action cannot be brought against TRPA. In *Western International Hotels, et al., v. Tahoe Regional Planning Agency, et al.*, 387 F.Supp. 429 (1975),

the Court found that the Compact, which provides the framework and the powers of the Tahoe Regional Planning Agency, lacks express language as to condemnation powers, and also fails to provide for the necessary funding of such powers or procedures for its exercise. Therefore, the Court concluded that an act of condemnation is beyond the authority of TRPA. In finding that inverse condemnation proceedings cannot be maintained against TRPA, the Court stated:

> "A cause of action for inverse condemnation cannot be asserted against a regulatory body or agency which does not possess the power of eminent domain. Nichols on Eminent Domain, Vol. 2, § 621, Cf. State v. Rank, 293 F.2d 340 (9th Cir. 1961)."

The Court further noted:

> "The cause of action sought to be established by these complaints is, therefore, a cause of action limited to declaratory and injunctive relief against the Land Use Ordinance of TRPA. If plaintiffs should establish that the Land Use Ordinance constitutes a taking of their properties, the Ordinance will be treated as action beyond TRPA authority and held invalid and no cause of action for damages will have been proved."

I concur with *Western International Hotels*.

THEREFORE, IT IS ORDERED that TRPA's motion to dismiss as to a cause of action for inverse condemnation is granted without leave to amend.

COUNTIES' MOTION TO DISMISS.

The counties had no part in enacting the Tahoe Regional Planning Compact. Furthermore, the duty to enforce and finance TRPA actions was forced upon the counties by the



Compact. While TRPA may be an agent of the states, it is clearly not an agent of the counties. Even if a cause of action is made out against TRPA, it will not constitute a cause of action against the counties. *Western International Hotels*, *supra*, at page 438. Therefore, the counties' motions to dismiss are granted.

THE STATES' MOTIONS TO DISMISS.

The Court in *Western International Hotels* also considered the states' involvement in a suit of this kind. The Court concluded:

> "A suit against an arm of the state, whether that arm is an agent or a separate legal entity, alleging action by the arm exceeding its authority 'is not regarded as a suit against the state, since the threatened action, being unauthorized, would not be that of the sovereign.' [Citations omitted]." *Supra*, at p. 439.

Accordingly, the states' motions to dismiss are granted.

INDIVIDUAL DEFENDANTS' MOTIONS TO DISMISS.

Federal courts have long held that members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland*, 387 U.S. 82 (1967). Therefore, individual defendants' motions to dismiss are granted.

FEDERAL DEFENDANTS' MOTION TO DISMISS.

TRPA is a separate legal entity and did not become an agency of the United States Government simply by the fact that Congress approved the interstate compact between

Nevada and California. Furthermore, there is insufficient federal involvement or control to hold the United States Government legally responsible for TRPA's actions. I also fail to find any authority which permits the federal defendants to be sued. Therefore, the federal defendants' motion to dismiss is granted.

Done and dated this 11th day of December, 1975.

JAMES F. BATTIN

*United States District Judge*



## *Appendix E*

### Tahoe Regional Planning Compact

Public Law 91-148 [83 Stat. 360]

AN ACT

To grant the consent of the Congress to the Tahoe regional planning compact, to authorize the Secretary of the Interior and others to cooperate with the planning agency thereby created, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe regional planning compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

"TAHOE REGIONAL PLANNING COMPACT

"Article I. Findings and Declarations of Policy

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural en-

dowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title.

"ARTICLE II. DEFINITIONS

"As used in this compact:

"(a) 'Region,' includes Lake Tahoe, the adjacent parts of the Counties of Douglas, Ormsby, and Washoe lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B.&M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

"(b) 'Agency' means the Tahoe Regional Planning Agency.

"(c) 'Governing body' means the governing board of the Tahoe Regional Planning Agency.

"(d) 'Regional plan' shall mean the long-term general plan for the development of the region.



"(e) 'Interim plan' shall mean the interim regional plan adopted pending the adoption of the regional plan.

"(f) 'Planning commission' means the advisory planning commission appointed pursuant to paragraph (h) of Article III.

"ARTICLE III. ORGANIZATION

"(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

"The governing body of the agency shall be constituted as follows:

"One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

"One member appointed by each of the boards of county commissioners of Douglas, Ormsby and Washoe counties. Any member so appointed shall be a resident of the county from which he is appointed and may be, but is not required to be:

"(1) A member of the board which appoints him; and

"(2) a resident of or the owner of real property in the region, as each board of county commissioners may in its own discretion determine. The manner of selecting the person so to be appointed may be further prescribed by county ordinance. A person so appointed shall before taking his seat on the governing body disclose all his economic interests in the region, and shall thereafter disclose any further economic interest which he acquires, as soon as feasible

after he acquires it. If any board of county commissioners fails to make an appointment required by this paragraph within 30 days after the effective date of this act or the occurrence of a vacancy on the governing body, the governor shall make such appointment. The position of a member appointed by a board of county commissioners shall be deemed vacant if such member is absent from three consecutive meetings of the governing body in any calendar year.

"One member appointed by the Governor of California and one member appointed by the Governor of Nevada. The appointment of the California member is subject to Senate confirmation; he shall not be a resident of the region and shall represent the public at large. The member appointed by the Governor of Nevada shall not be a resident of the region and shall represent the public at large.

"The Administrator of the California Resources Agency or his designee and the Director of the Nevada Department of Conservation and Natural Resources or his designee.

"(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

"(c) The term of office of the members of the governing body shall be at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years.

"(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the



State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as 'the first Monday of each month,' and shall not change such date oftener than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date, place and agenda at least 5 days prior to the meeting.

"(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

"(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be two years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

"(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

"(h) An advisory planning commission shall be appointed by the agency, which shall consist of an equal number of members from each state. The commission shall include but

shall not be limited to: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and the Counties of Douglas, Ormsby, and Washoe in Nevada, the Placer County Director of Sanitation, the El Dorado County Director of Sanitation, the county health officer of Douglas County or his designee, the county health officer of Washoe County or his designee, the Chief of the Bureau of Environment Health of the Health Division of Department of Health, Welfare and Rehabilitation of the State of Nevada or his designee, the executive officer of the Lahontan Regional Water Quality Control Board or his designee, the executive officer of the Tahoe Regional Planning Agency who shall act as chairman and at least four lay members each of whom shall be a resident of the region.

"(i) The agency shall establish and maintain an office within the region. The agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

"(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken. Upon receipt of certified copies of the resolutions or notifications appointing the members of the governing body, the Secretary of State of each respective state shall notify the Governor of the state who shall, after consultation with the Governor of the other state, issue a concurrent call for the organization meeting of the governing body at a location determined jointly by the two governors.



"(k) Each state may provide by law for the disclosure or elimination of conflicts of interest on the part of members of the governing body appointed from that state.

### "Article IV. Personnel

"(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this act or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

"(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency, and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

"(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

### "Article V. Planning

"(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its

adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this paragraph shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

"The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this paragraph.

"If a request is made for the amendment of the regional plan by:

"(1) a political subdivision a part of whose territory would be affected by such amendment; or

"(2) the owner or lessee of real property which would be affected by such amendment.

the governing body shall complete its action on such amendment within 60 days after such request is delivered to the agency.

"TAHOE REGIONAL PLAN

"(b) Within 15 months after the formation of the agency, the planning commission shall recommend a regional plan. Within 18 months after the formation of the agency, the governing body shall adopt a regional plan. After adoption, the planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards, and elements of the regional plan.



"The regional plan shall include the following correlated elements:

"(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.

"(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to, freeways, parkways, highways, transportation facilities, transit routes, waterways, navigation and aviation aids and facilities, and appurtenant terminals and facilities for the movement of people and goods within the region.

"(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

"(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails,

beaches and playgrounds, marinas and other recreational facilities.

"(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

"In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region. Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private individuals.

"(c) All provisions of the Tahoe regional general plan shall be enforced by the agency and by the states, counties and cities in the region.

"TAHOE REGIONAL INTERIM PLAN

"(d) Within 60 days after the formation of the agency, the planning commission shall recommend a regional interim plan. Within 90 days after the formation of the



agency, the governing body shall adopt a regional interim plan. The interim plan shall consist of statements of development policies, criteria and standards for planning and development, of plans or portions of plans, and projects and planning decisions, which the agency finds it necessary to adopt and administer on an interim basis in accordance with the substantive powers granted to it in this agreement.

"(e) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan and interim plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

"(f) All provisions of the interim plan shall be enforced by the agency and by the states, the counties, and cities.

"ARTICLE VI. AGENCY'S POWERS

"(a) The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans. Every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. The regulations shall contain general, regional standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers; harbors, breakwaters; or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks;

house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the interim or general plan.

"Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the interim plan or the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

"Interim regulations shall be adopted within 90 days from the formation of the agency and final regulations within 18 months after the formation of the agency.

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

"(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

"(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment.



"(b) All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

"(c) Except as otherwise provided in paragraph (d), all public works projects shall be reviewed prior to construction and approved by the agency as to the project's compliance with the adopted regional general plan.

"(d) All plans, programs and proposals of the State of California or Nevada, or of its executive or administrative agencies, which may substantially affect, or may specifically apply, to the uses of land, water, air, space and other natural resources in the region, including but not limited to public works plans, programs and proposals concerning highway routing, design and construction, shall be referred to the agency for its review, as to conformity with the regional plan or interim plan, and for report and recommendations by the agency to the executive head of the state agency concerned and to the Governor. A public works project which is initiated and is to be constructed by a department of either state shall be submitted to the agency for review and recommendation, but may be constructed as proposed.

"(e) The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules, regulations and policies. If it is found that the general plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

"(f) Violation of any ordinance of the agency is a misdemeanor.

"(g) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

"(h) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

"(i) Whenever a new city is formed within the region, the membership of the governing body shall be increased by two additional members, one appointed by, and who shall be a member of, the legislative body of the new city, and one appointed by the Governor of the state in which the city is not located. A member appointed by the Governor of California is subject to Senate confirmation.

"(j) Every record of the agency, whether public or not, shall be open for examination to the Legislative Analyst of the State of California and the Fiscal Analyst of the State of Nevada.

"(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved.



### "Article VII. Finances

"(a) Except as provided in paragraph (e), on or before December 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion not more than $150,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. Each county in California shall pay the sum allotted to it by the agency from any funds available therefor and may levy a tax on any taxable property within its boundaries sufficient to pay the amount so allocated to it. Each county in Nevada shall pay such sums from its general fund or from any other moneys available therefor.

"(b) The agency may fix and collect reasonable fees for any services rendered by it.

"(c) The agency shall be strictly accountable to any county in the region for all funds paid by it to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursements.

"(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds.

"(e) As soon as possible after the ratification of this

compact, the agency shall estimate the amount of money necessary to support its activities:

"(1) For the remainder of the then-current fiscal year; and

"(2) If the first estimate is made between January 1 and June 30, for the fiscal year beginning on July 1 of that calendar year.

The agency shall then allot such amount among the several counties, subject to the restriction and in the manner provided in paragraph (a), and each county shall pay such amount.

"(f) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

"ARTICLE VIII. MISCELLANEOUS

"(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in paragraph (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall



remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

"(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

"(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

"(d) No provision of this compact shall have any effect upon the allocation or distribution of interstate waters or upon any appropriative water right."

SEC. 2. The Secretary of the Interior and the Secretary of Agriculture are authorized upon request of the Tahoe Regional Planning Agency, to cooperate with said agency in all respects compatible with carrying out the normal duties of their Departments.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the Tahoe regional planning governing board.

SEC. 4. Any additional powers conferred on the agency pursuant to article VIII(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of

any law or regulation of the United States in, over, or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

SEC. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

SEC. 7. The right to alter, amend or repeal this Act is expressly reserved.

Approved December 18, 1969.



# *Appendix F*

## Excerpts from Briefs of the State of California and the State of Nevada Before the Ninth Circuit Court of Appeals

Brief of Appellee, State of California, August 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency, et al.*, pp. 7-9:

"Furthermore, it is plain that TRPA is not a department, division, bureau, board, commission or agency of the State within the meaning of [California Gov't Code § 940.6 defining the "State" for purposes of suit].

"Article III of the compact describes the organization of this agency and specifies at the outset:

> '(a) There is created the Tahoe Regional Planning Agency *as a separate legal entity.*' (Emphasis added)

"The inescapable conclusion of the separate nature of this legal entity is strengthened by an examination of the entire Article III, among others, which sets forth at length how this agency shall be organized and of what its membership shall consist. It is immediately apparent that some of the members are residents of and appointed by the State of Nevada or its political subdivisions and that the two states are equal partners in the formation of this agency—thus it could not be an agency of the State of California. Its existence as a regional agency on equal footing with a district is confirmed by the California Supreme Court in *People ex rel Younger v. County of El Dorado*, 5 Cal.3d 480, at e.g., p. 502 (1971), where the court observes that '. . . [A]ll districts, *including regional agencies such as the present one* [TRPA] are excluded from initiative, referendum and recall provisions . . .' (Emphasis added.)

"The fact that this agency was brought into existence, at least in part, through an act of the California Legislature, makes it no more a California State agency than are the City of Los Angeles or the County of Placer simply because legal authority for their creation and existence lies in State statutes. Indeed such agencies are clearly local public entities within the meaning of Gov. Code Section 940.4, which reads as follows:

> '"Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.'

"It is clear then that the TRPA is a public agency and thus a 'local public entity' rather than 'the State', and hence it is separate and distinct from the State, rather than being one of its arms, and the State is not a proper party defendant in this case."

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Brief of Appellee, State of Nevada, July 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency, et al.*, p. 7:

"The California Supreme Court, in *People ex rel Younger v. County of El Dorado*, 96 Cal.Rptr. 553, 487 p.2d 1193 observed that the TRPA was on an equal legal footing with local political subdivisions such as general improvement districts.

"The fact that the TRPA was created in part by an act of the Nevada Legislature does not make it any more an agency of the State than it is an agency of California or of the United States because of the acts of the California Legislature and the Congress approving the Compact. The counties of Nevada and its incorporated cities are not



agencies of the state merely because they are created or receive their charters by acts of the Legislature. As further evidence that the states and the Congress did not view the TRPA as a state agency is found in Article VII(f) of the Compact 'that no obligations contracted by the agency shall bind either of the party states.'

"Further, and most significant, the State of Nevada has no authority or control whatsoever over the TRPA, its policies, its deliberations, or its actions."